92-1127

NO.

Supreme Court, U.S.
FILED
DEC 22 1992
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In the
Supreme Court of the United States

OCTOBER TERM, 1992

JOHN R. HELTON, JEFF L. HIRZEL,
JAMES W. LITTLE, PHILIP E. SNODDY,
MARVIN L. WYNN,
Each, Individually and as a partner of
Sooner Vista, a partnership,

PETITIONERS,

v.

F.D.I.C., Receiver for Victor
Savings and Loan Association,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION 4,
STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

No. 1

Did the summary judgment of the trial court in favor of respondent, F.D.I.C., Receiver, against the petitioners, take their property without due process of law, secured to them by the 14th Amendment, U.S. Constitution?

No. 2

Was this 'taking' approved by division 4, Court of Appeals, State of Oklahoma and the Supreme Court of Oklahoma by each court's refusal to review the trial court's lack of jurisdiction to apply two inapplicable federal laws and thereby each appeal court deprived petitioners of 14th Amendment, U.S. Constitution, due process of law?

STATEMENT ABOUT PARTIES

A list of all parties in the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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Reference to the opinion of the court below

The memorandum opinion of the court below—Division 4, Court of Appeal, Oklahoma, was ordered to not be published. It is found in Appendix "B", Item 8, at page A-146.

Grounds for Jurisdiction

The date of the order sought to be reversed was November 8, 1989, Appendix "A", Item 8, page A-90. The date of the order respecting rehearing was September 23, 1992, Appendix "B", Item 12, page A-167.

Title 28 U.S.C. § 1257(a) is believed to confer jurisdiction to review this case. The *italicized* words are relied upon:

> "*Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari* *** *when any* title, *right* privilege or immunity *is specifically set up against claims under the Constitution,* or treaties *or statutes of,* or any commission held or authority exercised under, *the United States.*"

It is the 'right' to have a summary judgment for money rendered by a state trial court against petitioners, which had subject matter jurisdiction and authority to render the judgment in question.[1] The jurisdiction and authority used and relied upon by the state trial court that

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[1] This sentence describes the process due petitioners from the Oklahoma trial court by the 14th Amendment, U.S. Constitution. *Scott v. McNeal, infra.*

rendered the summary judgment assailed on appeal, was two laws of the United States.[2] Whether these two federal laws applied to supply the described jurisdiction of the trial court, *is disputed.* The highest court in the state, in which a decision could be had, declined and refused to review and annul a summary judgment for money that a state trial court had no subject matter jurisdiction to grant.

Scott v. McNeal[3] stands for the following rule: A state trial court judgment for money that was rendered without subject matter jurisdiction takes the property of the judgment debtor, (petitioners), without due process of law, in violation of of the 14th Amendment, U.S. Constitution.

When the dispute arises from the contract sought to be enforced, *D'Oench Duhme* case doctrine and 12 U.S.C. § 1823(e) have no application to a F.D.I.C. loan enforcement suit.[4]

The contract sought to be enforced was the alleged, so-called, 'guaranty agreement' of each petitioner.

The dispute results from disagreement over the liability intended by the parties arising from each agreement. The petitioners contend that the agreement is not an Oklahoma form of statutory guaranty because it is not a promise to answer for the debt of another; that it is a primary obligation of the debtor intended to limit their

---

[2] *D'Oench Duhme* case, 325 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) doctrine and 12 U.S.C. § 1823(e).

[3] 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896, (1904).

[4] Authorities in support of this statement are cited in the section stating the reasons to grant the writ.

liability arising from the partnership note. The respondent contends that the agreement is an agreement with a promise that was collateral to and independent from the partnership note. In addition, respondent contends that these two federal laws preempt all Oklahoma law that permits petitioners to make this contention.

In essence, respondents contend that these two federal laws authorized the respondent to decide what the agreements mean and that petitioners are barred and precluded of all right to contest.

Petitioners say and contend that their right to contest presents a federal due process right and presents a federal question that this Court has jurisdiction to review. Petitioners present and rely upon *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 35 S.Ct. 625, 59 L.Ed. 1027, (1914) to sustain this contention.

Applicability to this case of these two federal laws presents a federal claim. This presents a construction question for a court. Federal laws are required to be construed for or against their applicability. The applicability of these two federal laws has been adversely decided against petitioners by the highest court of Oklahoma in which a decision could be had. The disputed construction or effect of some law of the U.S. upon the determination of which result depends, is matter that this Court reviews. *Norton v. Whiteside,* 239 U.S. 144, 36 S.Ct. 97, 60 L.Ed.186, (1915), citing *Hull v. Burr,* 234 U.S. 712, 34 S.Ct. 892, 58 L.Ed. 1557, 1913.

The Constitutional provisions,
Congressional Acts and Case doctrine
involved in this case

U.S. Constitution

Article XIV, U.S. Constitution, provides in relevant part:

> " * * * [N]or shall any State deprive any person of * * * property without due process of law. * * * ."

U.S. Code

Title 12 U.S.C. § 1823(e) provides:

> "No agreement which tends to diminish or defeat the interests of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution shall be valid against the Corporation unless such agreement (1) is in writing. (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) has been continuously, from the time of its execution, an official record of the depository institution."

D'Oench Duhme case doctrine

D'Oench Duhme & Co. v. F.D.I.C. 325 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956, (1942), is the case, respondent, F.D.I.C. cites and relies upon. Respondent names it in "*D'Oench Duhme* case doctrine".

Petitioner approves of this name.

Petitioner will make a summary of the doctrine, subject to any exception taken by respondent.

> The *D'Oench Duhme* case doctrine preempts state law defenses based on oral or written matters arising collaterally and independently from the asset papers sought to be enforced by F.D.I.C. or F.S.L.I.C., which were concealed from the fiscal examiner of the insurance funds' agency. It is a conditional preemption law. It construed the National Banking Act, as amended. The majority opinion grounds its position upon the doctrine of estoppel. The petitioners say it is also grounded upon the Supremecy clause of Art. VI, U.S. Constitution. But, it is conditionally preemptive. One condition was noted by Mr. Justice JACKSON in his concurring opinion, 315 U.S. at 474, 62 S.Ct. at 687, [quote]
>
> "No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good faith commerical transactions are involved. * * *."

Statement of the jurisdictional case.

State in the proceeding in the state Court when the federal question sought to be reviewed we raised:

It was set up in the amended petition in error of petitioners, filed in the Oklahoma Supreme Court. There, it was

stated in Exhibit "C". Appendix "B", Item 1, page A-115.

Method or manner in which the federal questions were raised and the way they were passed upon, in this case, by Division 4, Oklahoma Court of Appeals.

The method or manner used to set up the federal law claims was in Exhibit "C" to the petition in error and by an original brief and reply brief in support thereof. The Appellate Court record of Exhibit "C" is stated next above. The entire 'Subject Index' of the original brief is found in Appendix "B", Item 6, page A-129. The entire 'Subject Index" of the reply brief is found in Appendix "B", Item 7, page A-135.

The way these set up federal claims were passed upon by the Court of Appeals

The Court of Appeals rendered an unpublished written opinion and ordered the assailed summary judgment of the trial court "affirmed". It is found in Appendix "B", Item 8, page A-146. A rehearing was requested. It is found in Appendix "B", Item 9, page A-151. Rehearing was denied. It is found in Appendix "B", Item 10, page A-156. A petition for a writ of certiorari to the Oklahoma Supreme was filed. It is found in Appendix "B", Item 11, page A-159. It was denied. Denial order is found in Appendix "B", Item 12, page A-167.

The appeal to this Court is made pursuant to Title 28 U.S.C. § 1257(a), from the "highest court of a State in which a decision could be had", as this Appellate Court record reflects, from Division 4, Oklahoma Court of Appeals. However, the appeal deadline time to this Court is to be measured from the date the Oklahoma Supreme Court

refused appeal by writ of certiorari. By rule, there is no right for a rehearing of the Supreme Court's refusal to grant a writ of certiorari.

Petitioners believe that they understand the rule of decision of this Court to be that local law governs the method, means and time fixing the scope of state court appellate review of claimed trial court errors and makes that law applicable to claims of trial court error arising therefrom and out of federal law.

The procedure and practice time limits to set up a claim for appellate review in Oklahoma appeal courts of law questions that grant state trial courts a subject matter jurisdiction, is found in *Hunter v. Hill.* Okl. 1975, 536 P.2d 358, 361. It is as late as the petition for rehearing in a Court of Appeals. It is probably as late as the petition for certiorari to the Oklahoma Supreme Court. This rule, in Oklahoma, is limited to cases in the trial court where the question involves fundamental or jurisdictional error. The *Hunter* case is in point because it directly involved a question of the trial court's subject matter jurisdiction. Petitioners rely upon its applicability. Petitioners set up the trial court's lack of subject matter jurisdiction *under federal law* in their amended petition in error addressed to the Oklahoma Supreme Court. Appendix "B", Item 1, Exhibit "C", page A-115, and their original brief, Appendix "B", Item 6, page A-129 and reply brief, Appendix "B", Item 7, page A-149.

Petitioners say and contend that their claimed trial court federal law errors were properly 'set up' and were 'timely' set up.

There remains, as a part of the statement of the jurisdictional case, the question of whether the Oklahoma

Court of Appeals made an adequate *and* independent, (both are required), decision adverse to the petitioners, grounded upon Oklahoma law.

Petitioners say and contend that the Court of Appeals never made an adequate *and* independent decision in reliance upon Oklahoma law uponwhich to ground the affirmance order; or, in the alternative that the opinion's reference to the existence of U.S. Constitutional claims reflects that court's notice and knowledge of petitioners' federal law claims and thus, they did decide and deny them. Petitioners say and contend that the court of Appeals affirmance order was sufficiently erroneous as to invoke this court's rule and decision in *Lawrence v. State Tax Commission*, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102 (1932). "Constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." Petitioners say and contend that Third Circuit Court's Mr. Justice ALDISERT's description of the opinion as being "tite-lipped" is a proper description of the opinion of the Court of Appeals. See, *Super Tire Eng. Co. v. McCorkle*, 1977, 550 F.2d 903, 907. The Court of Appeals never discharged its jurisdiction duty stated in the *Pointer* case, that of deciding whether the trial court rightly or wrongly used and relied upon two federal laws to support its jurisdiction to invoke preemptive federal law and totally exclude all Oklahoma law. Surely, the Court of Appeals never read *Riverside Park Realty Co. v. F.D.I.C.*, 1987, M.D.Tenn. 465 F.Supp. 305, 321, et seq. cited to it in petitioners' reply brief, Appendix "B", Item 7, pages A-136, A-138, A-139, A-142, A-144 and A-145. Surely, it never read *Scott v. McNeal*, supra, cited to it, *Id.* page A-141. The Court of Appeals was tendered but one ultimate issue or question in the amended petition in error. It never directly decided the one single trial court jurisdic-

tional subject matter set up in the amended petition in error. It departed therefrom and rendered merely advisory remarks about matters not in dispute that were settled in the trial court by not being presented in the amended petition in error. The Court of Appeals never did see in the record the amended answer of the petitioners, Appendix "A", Item 2, page A-41, §3. The lengthly footnote 1 in the opinion is an illusion of that court. It was about matter not remotely presented for review in the amended petition in error. Exhibit "C" to the amended petition in error stated what the appeal was all about. There was but one ultimate question briefed in two briefs for the use and benefit of the Court of Appeals—that of the trial court's subject matter jurisdiction arising under two federal laws. Were they applicable? Their non-applicability was the subject of *Riverside Park Realty*. The climax of that case was that F.D.I.C. was a party. It was about laws applicable to no one else in America except F.S.L.I.C. and F.D.I.C. *The most important single document in this lengthy record of this case is the self-written order refusing to reconsider of the honorable, honest and candid trial Judge, Sam P. Fullerton.* It is Appendix "A", Item 8, page A-90.

Incorporated herein by reference are four more lower federal court cases that go with *Riverside Park Realty,* which are cited in the section of this petition, entitled, 'Reasons to grant the writ'. In these four cases, F.D.I.C. was a party. Three are Circuit Court cases and one is a District Court case.

Summary

Subject to being wrong, petitioners believe that there are six elements of this Court's reviewing jurisdiction:

1. Has Congress authorized it by a specific statute?

2. Is review sought here about a federal jurisdictional law error in a state court trial?

3. In the state court system, was the federal jurisdictional law's error timely revealed to the state court system?

4. Is local law to be used to fix that time?

5. In good faith, did the Court of Appeals of Oklahoma adequately and independly (both are required) rest its decision upon Oklahoma law in holding adversely to the petitioners?

6 Did the state trial court's federal jurisdictional law error operate to invade the petitioners' 14th Amendment due process rights?

Petitioners believe that they have satisfied these six elements. This is a unique jurisdiction law case.

Reasons to grant the writ.

The state court summary judgment conflicts with the Spirit of the *D'Oench Duhme* case, as stated by Mr. Justice JACKSON in his concurring opinion, 315 U.S. 447, 475, 62 S.Ct. 676, 687, 86 L.Ed. 956, 1942.

> "* * * No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved. * * * ."

The trial court in its course and conduct of the case and in its decision to grant the assailed summary judgment, held, that the *D'Oench Duhme* case doctrine and Title 12 U.S.C. § 1823(e), were federal laws, jurisdictional in nature, binding upon the court, commanding and requireing the court to disregard Oklahoma law that would have required the court to compel the respondent to prove the truth of its allegations pretaining to the petitioners' money liability to the respondent, and, pursuant to the command of such federal law, that the court was required to find, that, under Oklahoma law, that there were no material disputed questions of fact that would require the court to call a jury. Accordingly, the trial court granted, summarily, all relief that respondent had requested. The above described procedural course and conduct of the case conflicts with and is contrary to the following U.S. Circuit Court cases:

(1) *Howell v. Continental Credit Corp.*, 7th Cir., 1981, 655 F.2d 743, opinion by Justice PELL;

(2) *F.D.I.C. v. Merchants Nat. Bank of Mobile,* 11th Cir., 1984, 725 F.2d 634, opinion by Justice GODBOLD;

(3) *F.C.I.C. v . Panelfab Puerto, Ins.,* 1st Cir., 1984, 739 F. 2d 26, opinion by Justice PETTINE.

In accord are the following U.S. District Court cases:

(1) *Riverside Park Realty Co. v. F.D.I.C.,* M.D.Tenn., [6th Cir.], 1978, 465 F.Supp. 305, opinion by Chief Dist. Judge MORTON; (2) *F.D.I.C. v. Rivera-Arroyo,* D.C. Pureto Rico, [1st Cir.], 1986, 645 F.Supp. 511, opinion by Judge CEREZO.

In operation and effect, the course and conduct of the trial before the trial judge produced the summary judgment. But, according to the above cited five federal court cases, these two federal laws were not applicable. The jurisdictional facts that would make them applicable were not present. The course and conduct of the trial lacked the support of the federal law used and relied upon. It was not applicable and therein is found the vice. The vice destroyed the court's authority and subject matter jurisdiction. The trial court had no discretion to conduct the trial according to inapplicable jurisdiction creating federal law. Mr. Justice MARSHALL said in *Worcester v. Georgia*, 6 Pet. 515, 541, 8 L.Ed. 483, that "Those who fill the judicial department have no discretion in selecting the subjects to be brought before them." The trial court's use and reliance upon inapplicable, jurisdiction creating federal law as the basis to manage the course and conduct of the trial, was the act of a court that was *corum non judice* and null and void. Its fruit, the summary judgment was likewise, null and void. It was null and void *ab initio*. It purported to transfer money from the petitioners to the respondent.

The mis-managed course and conduct of the trial conflicts with the decision of this Court in *Scott v. McNeal*, 1904, 154 U.S. 34, 14 S.Ct. 1198, 38 L.Ed. 896. In *Scott v. McNeal*, there was a mis-managed trial in the local district court that was followed by a mis-managed appeal in the state's Supreme Court. This bench case presents a duplicate event. The litigants are different and the state is different, but *the action* is a duplicate.

Some exerpts from the petition for a writ of certiorari to the Oklahoma Supreme Court show a reasonable reason, in light of this Court's repeated pleas to the bench and bar of this nation, why this Court should grant the writ requested. There is quoted the following from Appendix "B", Item 11 page A-159:

> 'The Court of Appeal's decision to refuse to review this case since it involved 14th Amendment due process constitutes *extreme* departure from the Court's accepted and usual course of judicial proceedings. Refusal to review by the Oklahoma Supreme Court will cast Oklahoma into the same position that the State of Washington found itself in *Scott v. McNeal*, 1904, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896."

In the same Appendix, and Item, page A-163.

> "The second arises from the State-Federal relationship. The U.S. Supreme Court has established a policy that it much prefers that the highest Court of a state have the first opportunity to rule upon a U.S. Constitutional question, where it is asserted by a person in a state Court that state action has invaded the U.S. Constitution. Such opportunity is in this case hereby offered to Oklahoma's highest Court. There is not any other fact needed."

The "not any other fact needed" was a reference to reasons to grant the writ.

This case involves the sensitive and often difficult-to-solve-problems, which are increasing, of our nations' dual-federalism. To some people, without much thought, this case would be viewed as a local problem. To others with some thought, this case would be viewed as a national problem. It is believed by the petitioners' counsel that there are many more people in this nation that are concerned with our dual-federalism than there are people who are not concerned. If this be true, that would be a plus as to why this Court's limited resources etc. should be given to this case. Also, it could be, that the court at this time, needs to

take and decide this case, to send out another message to our State high courts that they must *better* share in this Court's never ending, increasing burden to decide civil constitutional law cases. Why two Oklahoma appeal court's refused to explicitly rule and write upon the fundamental jurisdiction question presented to them is not understandable to petitioners' counsel.

Relief Requested

Petitioners request that this Honorable Highest Court in our Nation grant the writ sought and thereby give the petitioners permission to sue the respondent in this Court.

Very respectfully presented

/s/ R. M. Helton

R. M. Helton,
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a member of the Bar
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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION 4,
STATE OF OKLAHOMA

APPENDIX A
VOLUME I

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APPENDIX A

ITEM #1

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
MAR 15 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMIS SIONERS OF DELAWARE COUNTY: AND CHARLES J. DAVIS,

Defendants.

AMENDED PETITION

COMES NOW the Federal Savings and Loan Insurance Corporation ("FSLIC") in its capacity as receiver of Plaintiff Victor Savings & Loan Association ("Victor") and for its amended petition alleges the following:

1. On May 13, 1983, Defendant Sooner Vista a/k/a Sooner Vista Partnership ("Sooner") was a general partnership formed pursuant to the laws of Oklahoma. On that date:

Defendant Mike Barnett ("Barnett")
Defendant Jim H. Biffle ("Biffle")
Defendant John R. Helton ("Helton")
Defendant Jeff L. Hirzel ("Hirzel")
Defendant James W. Little ("Little")
Defendant Kenneth E. Miller ("Miller")
Defendant Phillip E. Snoddy ("Snoddy")
Defendant Marvin L. Wynn ("Wynn")

collectively "the partners" and Royce M. Hammons were partners in the partnership.

2. On May 13, 1983, Victor Federal Savings & Loan Association, a federal chartered savings and loan association, ("Victor Federal") made a loan to Sooner in the principal amount of $214,200.00 plus closing costs of $3,643.21. Sooner used the loan proceeds to purchase a condominium, Suite 1010 in Sooner Vista Towers at Grand Lake. In consideration of the loan, Sooner executed and delivered to Victor Federal a note in the principal amount of $217,843.21. A copy of the note is attached hereto as Exhibit A.

3. On May 13, 1983 and in conjunction with the execution and delivery of the note, Sooner executed and delivered to Victor Federal a mortgage on the following property:

> Unit 1010 of Shangri-La Vista Towers, a unit ownership estate according to the recorded declaration and plan thereof, and an undivided 1.10% interest in and to the common elements and appourtenances thereto belonging, all according to and more particularly described and shown in the Declaration of Unit Ownership Estate and By-Laws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, Pages 138-163, inclusive, in the Office of the County Clerk, Delaware County, Oklahoma.

("the property.") The mortgage tax was paid and the mortgage was recorded on May 17, 1983 in Book 447 at Page 587 in the records of the County Clerk of Delaware County, Oklahoma. A copy of the mortgage is attached hereto as Exhibit B.

4. On May 13, 1983 and in consideration of Victor Federal's loan to Sooner, the partners executed and delivered to Victor Federal written guaranty agreements,

each of which unconditionally guaranteed payment of "10% (plus closing costs estimated at $5,000) of the original loan to Sooner of $214,200.00. Closing costs on the loan totalled $3,643.21. Copies of the guaranties are attached hereto as Exhibit C-1 through C-8.

5. As a result of scrivener's error, the guaranties referred to in paragraph 4 above, while intended by Victor Federal and the partners to guarantee the indebtedness of Sooner, as debtor, to Victor Federal, instead list the various partners as the "debtors" on the guaranties. The scrivener's error should be corrected and the guaranties reformed to reflect that the "debtor" referred to in the guaranties is Sooner Vista and reformation should be ordered by reason of the scrivener's error and mutual mistake of the parties.

6. On March 13, 1985, the note was in default. On that date, Sooner executed and delivered to Victor Federal an adjustable rate note which incorporated the balance of Sooner's indebtedness for the original loan of $214,200 plus closing costs ("the revised note"). A copy of the revised note is attached hereto as Exhibit D. The maturity date of the revised note was May 1, 1986. The revised note was secured by the mortgage.

7. On March 13, 1985, and in consideration of Victor Federal's forbearance from filing suit upon the note and its willingness to accept the revised note, Defendant John Stephen Hope ("Hope") executed and delivered to Victor Federal a written guaranty agreement which guaranteed 10% of loan #20-018499-6, with a balance of $217,313.04 as of March 13, 1985, of the original loan of $214,200 dated May 13, 1983 on the property. A copy of Hope's guaranty is attached hereto as Exhibit E.

8. In August, 1985, Sooner defaulted on the revised note. On September 16, 1985, Sooner, Hope and the partners were sent a demand letter. The default was not cured and the revised note was accelerated on October 16, 1985.

9. On March 13, 1987, the Federal Home Loan Bank Board ("Bank Board") placed Victor Federal into receivership with the FSLIC acting as receiver. On the same date, the assets of Victor Federal, including the note, mortgage, guaranties and revised note involved in this case, were transferred to Victor Savings & Loan Association, a federal savings and loan association ("Victor").

10. On July 28, 1988, the Bank Board placed Victor into receivership with the FSLIC acting as receiver.

11. The following amounts are now owed pursuant to the revised note and mortgage:

Principal	$228,205.04
Interest through November 18, 1988	$ 60,752.46
Interest from November 19, 1988	$ 49.92 per day
Late charges through November 18, 1988	$ 3,422.40
Abstracting expenses	$ 50.00
Maintenance expenses	$ 1,912.43

FIRST CLAIM FOR RELIEF
(NOTE)

12. Plaintiff incorporates the preceding allegations into this First Claim for Relief.

13. Sooner owes to Plaintiff the amounts alleged in Paragraph 16 and, if Sooner assets are insufficient to satisfy the judgment against Sooner, Hope and the partners owe the residual amount.

WHEREFORE, Plaintiff prays for judgment against Defendant Sooner Vista (a/k/a Sooner Vista Partnership), an Oklahoma partnership, for the amounts alleged herein and for judgment against Hope and the partners for any amount of that judgment against Sooner which its assets cannot discharge.

SECOND CLAIM FOR RELIEF
(MORTGAGE FORECLOSURE)

14. Plaintiff incorporates the preceding allegations into this Second Claim for Relief.

15. Defendants have defaulted according to the terms of the mortgage and Plaintiff is entitled to have the mortgage foreclosed and the property sold and the proceeds applied to the mortgage indebtedness.

16. Defendant Shangri-La Vista Towers Homeowners Association ("Homeowners Association") claims some interest in the property by reason of a vendor's lien in the amount of $11,333.79, which was recorded on December 6, 1985, in Book 495 at Page 731, of the records of the County Clerk of Delaware County, Oklahoma. The Homeowners Association should be re-

quired to assert in this action their interests in the property.

17. The Defendants, the County Treasurer of Delaware County (the "Treasurer") and the Board of County Commissioners (the "Commissioners") claim some interest in the Property by reason of unpaid ad valorem taxes for the years 1983 to the present.

18. The Defendant Charles J. Davis is, or may be claiming some right, title or interest in the property by reason of a purported mortgage or lien claimed by Davis.

WHEREFORE, Plaintiff prays for a judgment foreclosing the mortgage, declaring it to be a valid first lien against the property and ordering, in the event that the mortgage indebtedness remains unpaid, that the property be sold and the indebtedness satisfied from the proceeds of sale.

THIRD CLAIM FOR RELIEF
(REFORMATION OF GUARANTIES)

19. Plaintiff incorporates the preceding allegations into this Third Claim for Relief.

WHEREFORE, Plaintiff prays that the guaranties be reformed to reflect that the "debtor" referred to in the guaranties is Sooner Vista.

THIRD CLAIM FOR RELIEF
(GUARANTIES)

20. Plaintiff incorporates the preceding allegations into this Third Claim for Relief.

21. Hope and the partners have failed to pay the amounts owed to Victor.

WHEREFORE, Plaintiff prays for judgment against Hope and the partners to the full extent of their liability pursuant to their respective guaranties.

On all claims for relief, Plaintiff prays for costs, attorneys fees and any other relief to which it may be entitled.

Respectfully submittted,

SNEED, LANG, ADAMS,
HAMILTON & BARNETT

By /s/ Kevin C. Leitch

Kevin C. Leitch O.B.A. #5366
Mark L. Collier O.B.A. #013260
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-3145

Attorneys for FSLIC in its
Capacity as Receiver for Victor

FOR VALUE RECEIVED, The undersigned promises to pay to Victor Federal Savings and Loan Association, A Corporation, or order, the principal sum of Two hundred seventeen thousand eight hundred forty-three & 21/100—Dollars ($ 217,843.21), with interest from date at the rate of thirteen 15/100 per centum ($13.15) per annum on the unpaid balance until paid. The said principal and interest shall be payable at the office of Victor Federal Savings and Loan Association, in Muslogue, Oklahoma, or at such other place as holder hereof may designate in writing delivered or mailed to the debtor, in 35 equal monthly installments of Two Thousand four hundred thirty-five & 35/100—Dollars ($2,435.35), commencing on the first day of June, 1963, and continuing on the first day of each month thereafter for 35 months, with the entire principal balance due, and interest on the first day of the 36th month, that is on May 1st, 1988. It is agreed that the payments reflect ón amortization over a 360 month period, and the principal balance due on the 36th month shall be determined accordingly.

If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of any default in the payment of this note and if the same is collected by an attorney of law, the undersigned agrees to pay all costs of collection, including an attorney's fee of fifteen per centum (15%) of the amount then insing on the note.

This note is secured by mortgage of even date executed by the undersigned on certain property described

therein and represents money actually used for the acquistion of said property or the improvements thereon.

The undersigned severally waive demand, protest and notice of demand, protest and nonpayment.

Sooner Vista Partnership

/s/ Jim H. Biffle
Jim Biffle, Partner

Unit 1010 Shangri-La-
Vista Towers

_____

EXHIBIT A

$217,843,21.

A-11

REAL ESTATE MORTGAGE

447 - 557

THIS INDENTURE, made this 13 day of May 1983. between Sooner Vista Partnership State of Oklahoma. Party of the first part (hereinafter referred to as Party of the First Part, whether one or all) and VICTOR FEDERAL SAVINGS AND LOAN ASSOCIATION, a Corporation, of Muskogee, Oklahoma, Party of the Second Part, its successors or assigns.

WITNESSETH; That the said party of the first part for and in consideration of the sum of Two hundred seventeen thousand eight hundred forty three and 21/100 Dollars ($217,843.21) in hand paid, receipt of which is hereby acknowledged, by these presents Grants, Bargain, Sell, Convey, and Mortgage unto the party of the second part, the following described real estate, situated in Deleware County, State of Oklahoma, to-wit:

Unit 1010 of Shangri-La Vista Towers, a unit-ownership estate according to the record declaration and plan thereof, and an undivided 1.10% interest in and to the common elements and appurtenances thereto belonging, all according to and more particularly described and shown in the Declaration of Unit Ownership Estate and By-Laws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, pages 138-163, inclusive, in the official County Clerk, Delaware County, Oklahoma.

Filed May 17, 1983

together with all the improvements that was made thereto belonging and warrant the title to the same.

EXHIBIT B

This mortgage is given for the purpose of securing the payment of a certain monthly payment note of even date herewith, representing a loan by party of the second part to party of the first part and to accure payment of any extension thereof, said note is by reference made a part hereof. Said Note is due and payable in three (3) full years from date hereof.

Failure to make any payment when due or any breach of the other provision hereof shall make the entire principal sum and accrued interest due and payable at once without notice at the option of the holder of this note and mortgage and collection thereof enforced by foreclosure of this mortgage, and failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default and the party of the second part, or its successors or assigns, may at its option pay such taces, assessments, or any other legal lien thereon, or insurance premiums, or make repairs; and the sum or sums so paid with interest thereon at the rate of fifteen percent per annum from the date of said payment by party of the second part, shall constitute a lien upon said premiums accured by and collectible under this mortgage and be grounds for foreclosure. The party of the second part may collect a "late charge" not to exceed an amount equal to five percent (5%) of any installment which is not paid within fifteen (15) days from the due date thereof to cover the extra expense involved in handling delinquent payments.

Party of the first part shall not permit any liens for taxes, assessments, improvements or repairs against this property and shall keep said property and improvements thereon in good repair.

Party of the first part shall keep all improvements on said property insured against any loss or damage in peace or in war in the amount of the total indebtedness in companies acceptable to party of the second part, and shall deliver said polities to the party of the second part with loss payable clauses executed in favor of the party of the second part, who shall have authority to make proof of loss the under, and in event of foreclosure or transfer of title to settle the debt herein, title to all said policies shall vest in party of the second part.

Party of the first part agrees to pay each month one-twelfth (1/12th of the sums necessary to pay taxes, special assessments and all insurance premiums for each current year and hereby authorizes the party of the second part at its option, to use such sums for payment of such taxes, special assessments and/or insurance premiums using its judgment as to dates and other payment thereof.

Any sale or transfer of the premisses herein mortgaged without concent of the party of the second part or any failure to make any of the hereby certified payments shall render the unpaid balance of the indebtedness, interest, payments and costs as herein provided and excuted hereby due and collectable, at the option of the party of the second part.

In case of foreclosure of this Mortgage, and/or the turning over of this mortgage to an attorney for collection, and as often as any proceeding shall be taken to foreclosures same as herein provided, the party of the second part shall immediately be entitled to recover an attorney's fee of fifteen percent of the total amount then due, in addition to all other legal costs in the action, including total amount then due, in addition to all other legal costs in the action, including the cost of procuring or completing

an abstract of title to said property, which shall be an additional lien accured by and collectable under this mortgage.

Appraisement of said premises is waived or not at the option of the party of the second part.

As additional security for the payment of said indebtedness, the party of the first part hereby assigns and transfers all rentals, insures, profits and income from the above premises to the party of the second part in cae of default as provided in said note and mortgage, hereby authorizing the party of the second part to receive and collect such rents and credit the amounts collected, less expenses of collexting, upon said total indebtedness, and does consent hereby to the appointment of receiver to collect same in case foreclosure is commenced hereunder.

The granting of any extension or extensions of time of payment of said note, either to the maker or to any other person, or the taking of other or additional security for payment thereof, or the waiver of or failure to exercise any right to mature the whole debt under any convenant or stipulation herein contained, shall not in anywise affect this mortgage nor the rights of the said party of the second part hereunder, nor operate as a release from any personnal liability upon said note nor any convenant or stipulation herein contained.

In the event the Mortgagor obtains further advances from the Association pending the repayment of the note above mentioned, the sum so advanced shall be added to the principal amount remaining due on the original note and repaid as hereinabove provided, ar as agreed upon, and it is expressly agreed that this mortgage shall likewise secure any future sums so advanced by the Association to the Mortgagor.

All Covenants and conditions herein shall be binding on the party of the first part and said first party's heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the party of the first part has hereunto ser his hand and seal this 13th day of May, 1983.

SEAL

/s/ Jim H. Biffle

Jim Biffle, partner
Sooner Vista Partnership

STATE OF OKLAHOMA Muskogee County as:

The foregoing instrument was acknowledged before me this 13th day of May, 1983 by Jim Biffle, partner, Sooner Vista Partnership

(person acknowledging)

My commission expires:
8-16-86

Sherry E. Ray
Notary Public

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Mike Barnett 3903 Green Hills Court Norman, Oklahoma 73069	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Mike Barnett
	Mike Barnett

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Jim H. Biffle The Philtower Penthouse Tulsa, Oklahoma 74103	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Jim H. Biffle
	Jim H. Biffle

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
John R. Helton 7505 S. Braden Tulsa, Oklahoma 74136	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	John R. Helton
	John R. Helton

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Jeff Hirzel 824 East Cleveland Cuthrie, Oklahoma 74044	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

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The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Jeff Hirzel
	Jeff Hirzel

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
James Little 17 Park Lane Galveston, Texas 77551	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

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in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

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The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	James W. Little
	James Little

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Kenneth Miller 4301 NW 63rd, Suite 303 Oklahoma City, Oklahoma 73116	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Bety J. Westerman	Kenneth E. Miller
	Kenneth E. Miller

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Phillip E. Snoddy	Victor Federal Savings & Loan
Monarch Interiors	
7633 E. 63rd Pl. Ste. 319	420 West Broadway
Tulsa, Oklahoma 74133	Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ illegible	Phillip E. Snoddy
	Phillip E. Snoddy

GUARANTY AGREEMENT May 13, 1983

Debtor Name and Address	Bank Name and Address
Marvin L. Wynn Whiteside & Grant Real. Parkland Plaza Bldg. 2121 South Columbia Tulsa, Oklahoma 74114	Victor Federal Savings & Loan 420 West Broadway Muskogee, Oklahoma 74401

For value received, and for the purpose of enabling the above named Debtor to obtain or renew loans, credit or other financial accommodation from the Bank named herein, each of the undersigned as a primary obligor, jointly and severally and unconditionally: (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity, and whether created by direct dealing with Bank or through transfer from others, and regardless of the nature and form of such indebtedness, including judgment, promissory notes, open accounts or any other form of indebtedness or obligation: (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default: and (3) further agrees to be bound by and on demand to pay any deficiency established by a sale of security held by Bank with or without notice to the undersigned.

Bank may at any time without the consent of or notice to the undersigned without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned, and upon any terms and conditions the Bank may elect: (1) change the manner, place or

terms of payment or extend the time of payment of any indebtedness of Debtor to Bank: (2) renew or alter any indebtedness of Debtor to Bank: (3) raise or lower the interest rate or rates charged Debtor: (4) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time pledged to secure or securing the indebtedness of Debtor to Bank any liabilities incurred directly or indirectly hereunder or any offsets against any such indebtedness or liabilities: (5) exercise or refrain from exercising any rights against Debtor or others or otherwise act or refrain from acting: (6) settle or compromise any indebtedness hereby guaranteed or hereby incurred: (7) subordinate the payment of all or any part of any indebtedness of Debtor to Bank regardless of what indebtedness or liability of Debtor to Bank remains unpaid.

This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon any indebtedness or other obligation hereby guaranteed. Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without affecting the liability hereunder of any of the undersigned or any other party not so released. The undersigned further agree to the addition of guarantors without notice.

All rights of the Bank are cumulative and not alternative to other rights. The Bank may assign this Agreement or any of its rights and powers hereunder, with all or any of the indebtedness hereby guaranteed, and may assign to any such assignee any of the security therefore and in the event of such assignment, the assignee hereof shall have the same rights and remedies as if originally named herein

in place of Bank, and the Bank shall thereafter by fully discharged from all responsibility with respect to any such indebtedness so assigned.

This Guaranty Agreement is understood to be unlimited in amount unless expressly limited to the following:

Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

The undersigned may, by written notice given to and received by Bank, withdraw from liability for additional indebtedness of Debtor accepted by or incurred to Bank from the time of receipt of such notice by Bank, but the liability of the undersigned shall not be otherwise affected.

WITNESSES SIGNATURES	GUARANTORS SIGNATURES
/s/ Sherry E. Ray	Marvin L. Wynn
	Marvin L. Wynn

ITEM #2

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
AUG 15 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,

Defendants.

ANSWER OF DEFENDANTS HIRZEL, LITTLE, HELTON, WYNN, SNODDY, BARNETT AND MILLER TO AMENDED PETITION

The Defendants, Jeff L. Hirzel, James W. Little, Mike Barnett, John R. Helton, Phillip E. Snoddy, Marvin L. Wynn, and Kenneth E. Miller (collectively referred to as the "Defendants") answer the Amended Petition of the Federal Savings And Loan Insurance Corporation as follows:

1. The Defendants deny each and every allegation of the Amended Petition except as expressly admitted herein.

2. The Defendants admit the allegations contained in paragraphs 1 through 3 of the Amended Petition.

3. With respect to paragraph 4 of the Amended Petition, the Defendants admit execution of the Guaranty Agreements but deny the legal effect attributed to them by FSLIC.

4. With respect to paragraph 5 of the Amended Petition the Defendants admit an error in the execution of certain Guaranty Agreements but deny FSLIC's entitlement to reformation.

which might be determined to exist in favor of the Plaintiff and against these Defendants under, and as a result of any such individual Guaranties.

WHEREFORE, the Defendants pray that in the event these Defendants have any liability under their separate Guaranties to the Plaintiff, the release of the Defendant Hammons Guaranty by the Plaintiff be declared null and void and that the Defendant Hammons be required to share jointly and severally with these Defendants any liability which might be determined to exist in favor of the Plaintiff and against these Defendants under, and as a result, of such individual Guaranties. The Defendants further pray that they be entitled to recover their costs incurred herein, including a reasonable attorney's fee and such other further relief as this Court deems just and equitable.

Respectfully submitted,

/s/ Joal R. Hogue

Gene C. Buzzard, OBA #1396
Joel R. Hogue, OBA #11351

GABLE & GOTWALS, P.C.
2000 Fourth National Bank Building
15 West Sixth Street
Tulsa, Oklahoma 74119-1217

ATTORNEYS FOR DEFENDANTS JEFF L. HIRZEL, JAMES W. LITTLE, MIKE BARNETT, JOHN R. HELTON, PHILIP E. SNODDY, MARVIN L. WYNN AND KENNETH E. MILLER

ITEM #3

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
JUL 14 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

No. C-85-371

SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista); MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);

COUNTY TREASURER OF)
DELAWARE COUNTY: BOARD)
OF COUNTY COMMIS-)
SIONERS OF DELAWARE)
COUNTY,SHANGRI-LA VISTA)
TOWERS HOMEOWNERS ASSOCIATION;)
and CHARLES J. DAVIS,)
)
Defendants.)

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor") hereby moves this Court, pursuant to Rule 13 of the Oklahoma District Court Rules, to enter a judgment in its favor as a matter of law since there are no genuine issues of material fact herein. In support thereof, FSLIC as receiver for Victor submits its Brief which is filed concurrently herewith.

WHEREFORE, FSLIC as receiver for Victor prays that this Court enter a judgment in its favor on its claims against Defendants.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By /s/ R. Mark Petrich,

William D. Nay, OBA #6588
R. Mark Petrich, OBA #11956
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER FOR VICTOR SAVINGS AND LOAN ASSOCIATION

ITEM #4

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
JUL 14 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,SHANGRI-LA VISTA TOWERS HOMEOWNERS ASSOCIATION; and CHARLES J. DAVIS,

Defendants.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor"), submits this Brief in Support of Motion for Summary Judgment.

I. Statement of Facts[1]

1. On May 13, 1983, Defendant Sooner Vista a/k/a Sooner Vista Partnership ("Sooner") was a general partnership formed pursuant to the laws of Oklahoma. On that date:

---

[1] "Partners' Answer" means the Answer of Defendants, Jeff H. Hirzel, John R. Helton, Marvin L. Wynn, Phillip E. Snoody, James W. Little, Mike Barnett and Kenneth E. Miller filed February 19, 1986. "Hope's Answer" means that Answer and Crossclaim of Defendant John Stephen Hope to Amended Petition filed March 15, 1989. "Odean Affidavit" means the Affidavit of Gregory A. Odean, attached hereto as Exhibit "F". "Hope Deposition" means the excerpts from the deposition of Defendant James Stephen Hope, attached hereto as Exhibit "G".

Defendant Mike Barnett ("Barnett")
Defendant Jim H. Biffle ("Biffle")
Defendant John R. Helton ("Helton")
Defendant Jeff L. Hirzel ("Hirzel")
Defendant James W. Little ("Little")
Defendant Kenneth E. Miller ("Miller")
Defendant Phillip E. Snoddy ("Snoddy")
Defendant Marvin L. Wynn ("Wynn")

collectively "the Partners" and Royce M. Hammons were partners in the Sooner. Partners' Answer, Paragraphs 2 and 6; Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 2.

2. On May 13, 1983, Victor Federal Savings & Loan Association, ("Victor Federal") made a loan to Sooner in the principal amount of $214,200.00 plus closing costs of 3,643,21 (Loan No. 20-018499-6). Sooner used the loan proceeds to purchase a condominium, Suite 1010 in Sooner Vista Towers at Grand Lake. In consideration of the loan, Sooner executed and delivered to Victor Federal a note in the principal amount of $217,843.21. A copy of the note is attached hereto as Exhibit "A". Partners' Answer, Paragraph 6; Hope Answer, paragraph 1; Odean Affidavit, Paragraph 3.

3. On May 13, 1983 and in conjunction with the execution and delivery of the note, Sooner executed and delivered to Victor Federal a mortgage on the following property:

> Unit 1010 of Shangri-La Vista Towers, a unit ownership estate according to the recorded declaration and plan thereof, and an undivided 1.10% interest in and to the common elements and appurtenances thereto belonging, all accord-

ing to and more particularly described and shown in the Declaration of Unit Ownership Estate and By-Laws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, Pages 138-163, inclusive, in the Office of the County Clerk, Delaware County, Oklahoma.

("the property.") The mortgage tax was paid and the mortgage was recorded on May 17, 1983 in Book 447 at Page 587 in the records of the County Clerk of Delaware County, Oklahoma. A copy of the mortgage is attached hereto as Exhibit B. Partners' Answer, Paragraph 6; Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 4.

4. On May 13, 1983 and in consideration of Victor Federal's loan to Sooner, the partners executed and delivered to Victor Federal written guaranty agreements, each of which unconditionally guaranteed payment of "10% (plus closing costs estimated at $5,000) of the original loan to Sooner of $214,200.00. Closing costs on the loan totalled $3,643.21. Copies of the guaranties are attached hereto as Exhibit "C-1" through "C-7". Partners' Answer, Paragraphs 6 and 7; Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 5.

5. As a result of scrivener's error, the Partners' guaranties, while intended by Victor Federal and the partners to guarantee to Victor Federal the indebtedness of Sooner, as debtor, instead listed the various Partners as the "debtors" on the guaranties. Partners' Answer, Paragraphs 6 and 7. Exhibits "A", "B", "C-1" through "C-7".

6. On or about January 14, 1985, Hope became a partner in Sooner. In consideration of Victor Federal's forbearance from filing suit upon the note, Defendant John

Stephen Hope ("Hope") executed and delivered to Victor Federal a written guaranty agreement which guaranteed 10% of Loan No. 20-018499-6, with a balance of $217,313.04 as of March 13, 1985, of the original loan of $214,200.00 dated May 13, 1983, on the Property. A copy of Hope's guaranty is attached hereto as Exhibit "D". Hope Deposition, 6(5-14); 11(13)-16(21); 19(8)-21(4); 25(16-15). Odean Affidavit, Paragraph 7; Hope Deposition, 4(11)-6(4); 6(25)-7(3).

7. On March 13, 1985, the note was in default. On that date, Sooner executed and delivered to Victor Federal an adjustable rate note (the "revised note") which incorporated the balance of Sooner's indebtedness for the original loan of $214,200 plus closing costs. A copy of the revised note is attached hereto as Exhibit "E". The maturity date of the revised note was May 1, 1986. The revised note was secured by the mortgage. Upon the delivery of the revised note to Victor Federal, Victor Federal did *not* mark the note "Paid" or otherwise cancel it, nor was the note returned to Sooner; it was held by Victor Federal. No new funds were disbursed on the basis of the revised note; no new funds were disbursed on the basis of the revised note; no new loan account was opened in Victor Federal's records. Rather, the loan continued to be handled under the same account number asigned to the note. Victor Federal did not release the Partners from liability on the note or their guaranties by means of any written or verbal release. The revised note was used only to change the interest rate applied to the loan account. Odean Affidavit, Paragraph 8.

8. In August, 1985, Sooner defaulted on the revised note. On September 16, 1985, Sooner, Hope and the Partners were sent a demand letter. The default was not cured and the revised note was accelerated on October 16, 1985. Odean Affidavit, Paragraph 9.

9. On March 13, 1987, the Federal Home Loan Bank Board ("FHLBB") placed Victor Federal into receivership with the FSLIC acting as receiver. On the same date, the assets of Victor Federal, including the note, mortgage, guaranties and revised note involved in this case, were transferred to Victor Savings & Loan Association, a federal savings and loan association ("Victor"). Hope Answer, Paragraph 1; Odean Affidavit, Paragraph 10.

10. On July 28, 1988, the Bank Board placed Victor into receivership with the FSLIC acting as receiver. Odean Affidavit, Paragraph 11.

11. The following amounts are now owed pursuant to Loan No. 20-01849-6::

Principal	$228,205.04
Interest through November 18, 1988	$ 60,752.46
Interest from November 19, 1988	$ 49.92 per day
Late charges through November 18, 1988	$ 3,422.40
Abstracting expenses	$ 50.00
Maintenance expenses	$ 1,912.43

Odean Affidavit, Paragraph 12.

12. Defendant Shangri-La Vista Towers Homeowners Association ("Homeowners Association") filed against the Property a vendor's lien in the amount of

$11,333.79, which was recorded on December 6, 1985, in Book 495 at Page 731, of the records of the County Clerk of Delaware County, Oklahoma. The Homeowners Association's lien is inferior to that of FSLIC.

13. The Defendants, the County Treasurer of Delaware County (the "Treasurer") and the Board of County Commissioners (the "Commissioners") claim some interest in the Property by reason of unpaid ad valorem taxes for the years 1983 to the present.

14. On December 6, 1985, the Defendant Charles J. Davis ("Davis") filed against the Property a lien in the amount of $4,232.50, which was recorded in Book 495 at Page 730 of the records of the County Clerk of Delaware County, Oklahoma. Davis' lien is inferior to that of FSLIC.

II. ARGUMENT

The motion for summary judgment is made pursuant to OKLA. DIST. CT. R. 13. Rule 13(e) provides:

> If it appears to the court that there is no substantial controversy as to any material fact and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment to said party whether or not he is the moving party.
>
> If the court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the remaining fact or issues, and such order is interlocutory and is not reviewable on appeal prior to final judgment.

Suits to enforce negotiable instruments are among the most suitable classes of cases for summary judgment. *Lloyd v. Lawrence*, 472 F.2d 313, 316 (5th Cir. 1973).

A. ***FSLIC'S PRIMA FACIE CASE***

1. ***FIRST CLAIM FOR RELIEF (NOTE):***

a. ***Sooner.***

A prima facie case for summary judgment against Sooner has been made by FSLIC: the execution and delivery of the note, Sooner's default in payments and the amount due, and Sooner's failure to pay the indebtedness. *Anderson v. Scanlon*, 60 P.2d 615, 618 (Okla. 1935).

b. ***Partners.***

OKLA. STAT. tit. 54 § 215 provides:

> *All partners are liable*
>
> (a) Jointly and severally for everything chargeable to the partnership under Sections 13 and 14. [Inapplicable here].
>
> (b) *Jointly for all other debts* and obligations of the partnerhsip; but any partner may enter into a separate obligation to perform a partnership contract.

(Emphasis added). Partners are jointly liable for debts of a partnership dispite the fact that the partnership is deemed a distinct entity separate from the individuals composing it. *Southard v. Oil Equipment Corp.*, 296 P.2d 780, 784 (Okla. 1956). In a case such as this, in which the Partners are individually served, the judgment should be rendered against the partnership with the provision that, if the partnership property is insufficient to satisfy the judgment, then execution may issue against the individuals composing the partnership. The Oklahoma Supreme Court has

stated that the proper form of judgment to be rendered in an action against a copartnership is:

> That the said plaintiff have and recover of and from the defendants Taylor, Taylor & Joe Davis, a copartnership composed of Leroy T. Taylor, O.G. Taylor, and Joe Davis, all of whom were personally served with summons, the sum of $685.50, together with all the costs of this action; for all of which *let execution issue against said partnership and the joint property be subjected to the payment of the said amount, and, if the partnership property be insufficient to satisfy the judgment, then let execution issue against the individuals* composing the partnership.

See Hassen v. Rogers, 253 P. 72, 74 (Okla. 1926) (emphasis added. *See also Heaton v. Schaeffer,* 126 P. 797, 798 (Okla. 1912).

2. ***SECOND CLAIM FOR RELIEF (MORTGAGE FORCLOSURE):***

Because of Sooner's default in payments, FSLIC has an undisputed right to have the mortgage foreclosed. Because of its priority in time, FSLIC's mortgage is superior to any liens claimed by any defendant named herein.

3. ***THIRD CLAIM FOR RELIEF (REFORMATION OF GUARANTIES):***

In general, where by reason of a scrivener's mistake, an instrument omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will consider it a mutual mistake common to both parties and correct the error in a manner that will place the

parties in the position they would have occupied had the error not occurred. *Dennis v. American — First Title & Trust Co.*, 405 P.2d 993 (Okla. 1965) Court syllabus 2; *Matlock v. Wheeler*, 306 P.2d 325 (Okla. 1956); *Davenport v. Beck*, 576 P.2d 1199, 1201 (Okla. App. 1977). As stated by the Oklahoma Supreme Court:

> Where there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected. *Ambrose v. Province*, 300 P. 758, 759 (Okla. 1931).

In short, equity will correct errors in an instrument shown to have resulted from an unintentional drafting mistake. *Davenport*, 576 P.2d at 1203.

In Oklahoma, the courts have reformed a variety of instruments as a result of scrivener's errors. *See Cunnius v. Field*, 449 P.2d 703 (Okla. 1969); *Welch v. Ruby*, 198 P.2d 432 (Okla. 1948); *Crabb v. Chisum*, 80 P.2d 653 (Okla. 1938); *Fidelity-Phoenix Fire Insurance Co. v. First National Bank*, 292 P. 829 (Okla. 1932), the court affirmed the reformation of a fidelity bond in which the name of the company which was the beneficiary of the bond had erroneously been placed in the space reserved for the bonded employee. The court relied on the following principles in reforming the bond:

> (Sureties) will not be relieved merely because they execute an instrument different from the one intended, nor will a clerical error which could not have misled, free them from liability.
>
> . . .Mistake may not only be expressly established but it may be inferred form the circumstances and

the nature of the transaction.

> . . .Where by mistake, the condition is so drawn as to be insensible and invalid, it may be read and construed in the light of the evident intention accords with justice and the rights of the case.

McClure, 12 P.2d at 880.

In *Keith v. Thomas,* 165 N.E. 679 (Mass. 1929), the name of the debtor in a guaranty was erreoneously stated to be Claude B. Thomas; credit was actually extended to C. B. Thomas Company, a corporation. The appellant court in affirming the decision of the trial court to reform the guaranty stated:

> As originally drawn, the instrument was valueless in the hands of the plaintiff; Claude B. Thomas had no account with them and had purchased no goods from them individually. In these circumstances it was proper to grant the prayer for reformation upon the ground that there was a mutual mistake as to the legal effect of the language used.

Keith, 165 N.E. at 680-681. See also *Bank of America National Trust & Savings Association v. Craig,* 14 Cal. Rptr. 476 (App. 1961).

In the case at bar, the Partners admit that they each executed the respective guaranty, and that each guaranty limited the individual liability of each Partner to ten percent (10%) of the original loan indebtedness represented by the note, plus certain closing costs not to exceed $5,000. The indebtedness represented by the note was incurred by Sooner, not by the Partners as individuals. The guarnanties mistakenly define "Debtor" as the individual who sign-

ed the guaranty, rather than as "Sooner", the entity whose indebtedness was intended to be guaranteed. Based on the foregoing authorities, the Partners' guaranties should be reformed to express the true intent of the parties. The stated name of the debtor should be "Sooner Vista a/k/a Sooner Vista Partnership, an Oklahoma general partnership".

4. ***FOURTH CLAIM FOR RELIEF (GUARANTIES):***

A guarantor's undertaking creates a collateral obligation independent and separately enforceable from that of the principal debtor. *Riverside National Bank v. Manolakis,* 613 P.2d 438, 441 (Okla. 1980). The obligation of a guaranty is contractual, and the Court's inquiry must, in each case, focus on the precise terms of the guarantor's undertaking. *Manolakis,* 613 P.2d at 441.

Each Partner's guaranty subject to this action provides that it is "absolute, unconditional and continnuing. . . ." Each Partner unconditionally:

> (1) guarantees to the Bank that Debtor will fully and promptly pay and discharge all indebtedness upon which Debtor now is or may hereafter, from time to time, become obligated to Bank either as principal guarantor, endorser, or in any other capacity . . . (2) agrees, without the Bank first having to proceed against Debtor or to liquidate any security, to pay on demand all sums due and to become due or incurred by Bank by reason of Debtor's default. . . .

Hope's guaranty provides:

> The undersigned Guarantor(s) hereby requests

> the Lender to give and continue to give the above named Customer(s) credit, and in consideration for any credit given, the undersigned Guarantor hereby absolutely and unconditionally guarantees payment, on demand without Lender first . . . or without the Liquidation of any collateral securing said indebtedness. Guarantor . . . guarantees payment of any and all existing and future indebtedness and liabilities of every kind, including all renewals, extensions, and modifications thereof from Customer(s) to Lender, however and whenever created or arising, or evidenced, or acquired. . . . This guaranty shall be absolute, unconditional, continuing and binding upon the estate of the undersigned Guarantor.

The guaranties are absolute and unconditional guaranties of payment. *Compare Abbott v. National Bank of Commerce,* 56 P.2d 886, 887 (Okla. 1936) ("I do hereby guarantee the payment of said note. . . ."); *Walker v. McNeal,* 272 P. 443, 446-47 (Okla. 1928) ("We . . . do hereby guarantee payment. . . ."); *Walker v. McNeal,* 269 P. 295, 296-97 (Okla. 1928) (Same). OKLA. STAT. tit. 15, § 332 provides:

> A guarantor of payment or performance is liable to the guarantee upon the default of the principal, and without demand or notice.

Thus, FSLIC is entitled to seek remedies immediately and independently from both Sooner and the Patners until the debt is satisfied. *Walker,* 269 P. at 297. The only limitation upon each Partners' liability is in the amount of:

> Ten percent (10%) (plus closing costs estimated at $5,000.00) of original loan of Two Hundred Fourteen Thousand Two Hundred Dollars and no/100 cents ($214,200.00) on Vista Towers Condominium.

In a suit brought upon a guaranty such as this, a prima facie case is established by proof of the original indebtedness, the debtor's default and the existence of the guaranty. *FDIC v. Meyer,* 781 F.2d 1260, 1267 (7th Cir. 1986); *Juzwik v. Juzwik,* 448 N.E.2d 1319, 1322 (Ill. App. 1986); *Mid-City Industrial Supply Co. v. Horwitz,* 476 N.E.2d 1271, 1277 (Ill. App. 1985).

FSLIC has demonstrated the amount of indebtedness, Sooner's default and the terms of the Partners' guaranties. The Partners' guaranties clearly cover Sooner's indebtedness. The note is due in its entirety and the Partners are liable to Victor for the amount of principal and interest owed by Sooner, up to the limits fixed by their guaranties.

B. *THE DEFENSES RAISED BY THE PARTNERS AND HOPE ARE INSUFFICIENT AS A MATTER OF LAW*

The Partners allege two defenses:

(1) Release; and

(2) Novation.

Hope asserts:

(1) Novation;

(2) Lack of certain formalties:

(3) Change in the underlying obligation; and

(4) Rescission of his partnership interest.

The Partners assert that when they sold their partnership interests, Victor Federal implied or expressly recognized that fact and agreed to release or did release them from liability. This defense is unsupportable. The Partners were not released form liability on the note simply

because they retired from the partnership. *Holland Reno Manufacturing Co. v. Homeland Music Co.*, 283 P. 235 (Okla. 1929); *Ellet-kendall Shoe Co. v. Miller*, 215 P. 417 (Okla. 1923). They could be released only by an agreement to that effect with Victor Federal. No such agreement, if it existed, is embodied in any writing and nothing in the files of Victor indicates that the Partners' guaranties were released. Consequently, as a matter of federal common law, the Partners are estopped from asserting that they have been released.

It has long been the rule that federal common law prevents and estops those who execute and deliver promissory notes and/or guaranties to federally insured banks from raising defenses against a bank's duly appointed receiver based on oral agreements with officers of failed banks. *See, e.g., D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). As stated by the Supreme Court in *D'Oench Duhme*, the underlying policy for such a rule is:

> To protect [the FDIC] and the public fund which it administers against misrepresentation as to securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans.

315 U.S. at 457. *See FDIC v. Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985). The principle established in *D'Oench Duhme* is necessary to ensure the smooth and efficient administration of an insolvent bank by its insured without unnecesssary disruption or panic. *FSLIC v. Hsi*, 657 F. Supp. 1333, 1338 (E.D. La. 1986). The principle also allows the FSLIC and the Federal Deposit Insurance Corporation ("FDIC") to rely on the records of insolvent banks in appraising the worth and collectibility of the failed bank's assets. *FDIC v. Powers*, 576 F. Supp. 1167, 1171 (N.D. Ill.

1983), *aff'd*, 753 F.2d 1076 (1984). It reaches all instruments where the "maker lent himself to a scheme or arrangement whereby the banking authority on which [FDIC] relied in insuring the bank was or was likely to be misled." *D'Oench Duhme*, 315 U.S. at 460.

The principle announced in D'Oench Duhme has been codified by statute for cases in which the FDIC has acquired bank assets in its corporate capacity. *See* 12 U.S.C.A. § 1823(e).[2] Although § 1823(e), by its own terms only applies to the FDIC acting in its corporate capacity, the rule announced in D'Oench Duhme is applicable to the FSLIC, as well as the FDIC, while acting in its capacity as receiver for a failed institution. *Firstsouth, F.A. v. Aqua Constr. Inc.*, 858 F.2d 441, 442-43 (8th Cir. 1988); *FDIC v. Van Laanen*, 769 F.2d 666 (10th Cir. 1985); *Dill v. FSLIC*, 678 F. Supp. 1404 (E.D. Ark. 1988); *FSLIC v. Lefeve*, 676 F. Supp. 764 (S.D. Miss. 1987); *FSLIC v. Hsi*, 657 F. Supp. 1333 (E.D. La. 1986). Cases decided under § 1823(e) have been deemed persuasive authority in construing *D'Oench Duhme* in actions brought on behalf of the FSLIC in its capacity as receiver. *Firstsouth*, 858 F.2d at 443. It has also been held that the common law rule in *D'Oench*

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[2] 12 U.S.C.A. § 1823(e) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously, from the time of its execution, an official record of the bank.

Duhme and its statutory counterpart should be treated consistently as they are both founded on the same policy and concerns. *Hsi,* 657 F.Supp. at 1338; *Lefeve,* 676 F. Supp. at 768. *See also* Garn-St. Germain Depository Institution Act of 1982, S. Rep. No. 536, 97th Congress, 2nd Session, *reprinted* 1982, U.S. Code Cong. and Ad. News, 3054 (FSLIC and FDIC have parrallel authority over their respective institutions).

D'Oench Duhme and its statutory counterpart, § 1823(e), have been broadly interpreted over the years in striking down various defenses raised by bank obligors, including lack of consideration, fraudulent inducement and breach of fiduciary duty to ensure that the FSLIC and the FDIC are able to administer the affairs of insolvent financial institutions in the most efficient and undisrputed manner possible. *See, e.g., FSLIC v. Murray,* 853 F.2d 1251 (5th Cir. 1988); *FDIC v. Venture Contractors, Inc.,* 825 F.2d 143 (7th Cir. 1987); *FDIC v. Langley,* 792 F.2d 541 (5th Cir. 1986) *aff'd* 108 S. Ct. 396 (1987); *FDIC v. Armstrong,* 784 F.2d 741 (6th Cir. 1986); *FDIC v. Investors Associates X., Ltd.,* 775 F.2d 152 (6th Cir. 1985); *FDIC v. Van Laanen,* 769 F.2d 666 (10th Cir. 1985); *FSLIC v. Dillon Constr. Co.,* 681 F. Supp. 1359 (E.D. Ark. 1988); *FDIC v. TWT Exploration Company,* 626 F. Supp. 149 (W.D. Okla. 1985); *FDIC v. Powers,* 576 F. Supp. 1167 (N.D. Ill. 1983), *aff'd,* 753 F.2d 1076 (1984). Even agreements made in good faith with a bank prior to the appointment of a receiver have been struck down under the *D'Oench Duhme* doctrine. *See FDIC v. Investors Associates X. Ltd.,* 775 F.2d 152 (6th Cir. 1985). Some courts have broadly construed *D'Oench Duhme* to hold that the FDIC and FSLIC take notes free of all personal defenses. *See, e.g., FDIC v. Wood,* 758 F.2d 156 (6th Cir. 1985).

D'Oench Duhme and its progeny have firmly

embedded in the federal common law the principle that the FSLIC and the FDIC "should not be bound by *anything* outside of banks' loan documents" when it acts as a receiver for a failed financial institution. *FDIC v. MM&S Partners,* 626 F. Supp. 681, 687 (N.D. Ill. 1985) (emphasis added). *See also Gunter v. Hutcheson,* 674 F.2d 862 (11th Cir. 1982), *cert. denied,* 459 U.S. 826 (1982), *reh. denied,* 459 U.S. 1059 (1982); *Lupin v. FSLIC,* No. 85-5896 1987 U.S. Dist. Lexis 5090 (E.D. La. 1987). In *MM&S* the court stated:

> The policy supporting FDIC protection in collateral agreement situations applies equally to all situations in which the makers defense is based on something, representations or conduct, outside of the note itself.

MM&S 626 F. Supp. at 687. The court in *MM&S* concluded that the collateral agreement between the defendant and the bank regarding payment dates and amounts could not be used as a defense to the FDIC's action to enforce the note, notwithstanding the fact that the FDIC had knowledge of the collateral agreement or the fact that the defendant made the collateral agreement in good faith. *See also FDIC v. Investors Associates X. Ltd.,* 775 F.2d 152 (6th Cir. 1985).

In *FDIC v. Galloway,* 856 F.2d 112 (10th Cir. 1988), the guarantors alleged, as a defense to the action to enforce the guarantees, that the bank president fraudulently induced them into executing the guarantees by orally assuring them that previous notes of the primary obligor had been paid off, when they actually had not, and also by the president's oral promise to establish a $50,000.00 escrow account to help cover the first payments on the new note which the guarantors guaranteed. The court relied on

D'Oench Duhme and 12 U.S.C. § 1823(e) in finding that the guarantor was estopped from asserting fraud in the inducement as a defense. *See also Firstsouth F.A. v. Aqua Constr. Inc.*, 858 F.2d 441 (8th cir. 1988); *FDIC v. P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987); *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369 (5th Cir. 1988); *FDIC v. Venture Contractors Inc.*, 825 F.2d 143 (7th Cir. 1987); *Public Loan Co. v. FDIC*, 803 F.2d 82 (3rd Cir. 1986); *FDIC v. Castle*,781 F.2d 1101 (5th Cir. 1986); *FDIC v. Wood*, 758 F.2d 156 (6th Cir. 1985); *FDIC v. Waldron*, 630 F.2d 239 (4th Cir. 1980); *FSLIC v. Port Allen Development Corp.*, 684 F. Supp. 439 (N.D. La. 1988).

In this case, there is no document which embodies the alleged release of the Partners from liability under the note or their guaranties. *D'Oench Duhme* applies directly to these circumstances and estoppes Defendants from asserting the defense of release.

2. *NOVATION (THE PARATNERS AND HOPE):*

The Partners and Hope argue that the revised note constitutes a novation. A novation is the substitution for and extinguishment of an old obligation by a new obligation. *Cardwell Investment Co. v. United Supply & Manufacturing Co.*, 268 F.2d 857, 859 (10th Cir. 1959). In every novation there are four essential elements:

(1) A previous valid obligation;

(2) The agreement of all the parties to the new obligation;

(3) The extinguishment of the obligation; and

(4) A valid new obligation.

Erwin v. Breese, 109 P.2d 507, 509 (Okla. 1940). A novation may be effected in three ways:

> (1) By the substitution of a new obligation between *the same parties*, with intent to extinguish the old obligation;
>
> (2) By the substitution of a *new debtor* in the place of the old one, with intent to release the latter;
>
> (3) By the substitution of a *new creditor* in the place of the old one, with intent to transfer the rights of the latter to the former.

State ex rel. Commissioners v. Pitts, 172 P.2d 923, 925 (Okla. 1946).

The Supreme Court of Oklahoma has consistently held that the mere giving of a new note for an obligation under a prior note does not discharge the liability on the prior note, unless the new note is given with the understanding on the part of both the maker of the new note and the holder of the prior note. *Cravens v. First State Bank*, 355 P.2d 1025, 1026 (Okla. 1960) The presumption is that the old obligation is not extinguished by the new. *Oil Field Gas Co. v. International Supply Co.*, 102 P.2d 91, 92 (Okla. 1940).[3] Finally, pursuant to the Oklahoma Uniform Partnership Act, it is permissible for any partner (Biffle) to enter into a separate obligation (the revised note) to per-

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[3] *See also, First National Bank & Trust Co. v. Daniel*, 701 F.2d 141, 142 (11th Cir. 1983); *In re Lambert Enterprises, Inc.*, 21 Bankr. 529, 530 (W.D. Va. Bankr. 1982); *Taines v. Capital City First National Bank*, 344 S.2d 273 (Fla. App. 1977); *Farmers Union Oil Co. v. Fladeland*, 178 N.W.2d 254, 257 (Minn. 1970); *First Pennsylvania Bank, N.A. v. Triester*, 380 A.2d 826, 830-31 (Penn. Super. 1977); *Wenzel v. Conrad Schmitt Studios*, 11 N.W. 2d 503, 505 (Wis. 1943).

form a partnership contract (the note). OKLA. STAT. tit. 15, § 215; *In re Fowler,* 407 F. Supp. 799, 806 (W.D. Okla, 1975); *Mandan Security Bank v. Heinsohn,* 320 N.W. 2d 494, 498 (N. Dak. 1982).

In this case, there was not agreement pursuant to which the "new obligation" was substituted for and extinguished the "old." Pursuant to *D'Oench Duhme*, such an agreement must be in writing in order to bind the FSLIC as receiver for Victor. None exists. Indeed, Victor Federal's records are entirely inconsistent with the idea of novation. The note was not marked "Paid" or otherwise cancelled.[4] Victor Federal's books do not reflect a cancellation of the note. No new funds were disbursed pursuant to the revised note; it simply restated the terms under which the proceeds paid pursuant to the note were to be repaid. The mortgage given on the note secures the revised note. There is no evidence which shows that all the parties to the note and the Partners' and Hope's guaranties agreed to the acceptance of the revised note as an extinguishment of the note. Under such circumstances, their alleged defense is invalid. *Fuller v. Stout,* 166 P. 898 (Okla. 1917); *Martin v. Leeper,* 149 P. 1130, 1141 (Okla. 1915); *Shiflet v. Marley,* 118 P.2d 1107, 1109-10 (Ariz. 1941); *Alton Banking & Trust Co. v. Schweitzer,* 460 N.E.2d 105, 108-09 (Ill. App. 1984); *First National Bank & Trust Co. v. Meyer Enterprises, Inc.,* 427 N.W. 2d 328, 330 (N. Dak. 1988).

3. *LACK OF FORMALTIES (HOPE)*

Hope argues that his guaranty is unenforceable because it is not witnessed, notarized or dated. In general, Oklahoma follows the common rule that a guaranty need not be expressed in any particular form. *Ross v. Russell,*

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[4] *See* OKLA. U.C.C. § 3-602.

475 P.2d 152, 154 (Okla. 1970). Because it is a type of contract, the rules that generally apply to the embodiment of a contract in writing apply to guaranties, unless otherwise stated in statute or case law. 38 C.J.S. *Guaranty* § 18.

No case has been found in which the presence of a date, witness or notary signature has been required on a guaranty. On the other hand, it has been held that the fact that a guaranty agreement is *not* dated when executed is immaterial, because no date is essential to its validity. *Eastman Oil Well Survey Co. v. Hamil*, 416 S.W.2d 597, 604 (Tex. Civ. App. 1967). Nor is the witnessing or notarization of a guaranty a prerequisite to its validity. "In the absence of a mandatory statute, an acknowledgment is not necessary to the validity of an instrument." *Germany v. Murdock*, 662 P.2d 1346, 1348 (N. Mex. 1983). There is no statutory requirement in Oklahoma that a guaranty be acknowledged or witnessed. In fact, even a deed is effective between the parties although it is not acknowledged. OKLA. STAT. tit. 16, 15. Here, Hope has admitted signing the guaranty; the lack of a witness or notarization is immaterial.

4. *CHANGE IN THE UNDERLYING OBLIGATION (HOPE)*

Hope argues that he is discharged from liability pursuant to OKLA. STAT. tit. 15 § 338 on the guaranty because the underlying obligation — the note — was altered. This position is untenable for two reasons. First, the underlying obligation was not altered. the note is still a valid obligation, as discussed above. Second, Hope's alleged defense ignores the fact that a guarantor can agree by the terms of his guaranty to alterations of the underlying agreement. Indeed, they typically do. In *Ford Motor Credit v. Milburn*, 615 F.2d 893 (10th Cir. 1980) (ap-

plying Oklahoma law), the defendants waived their ability to defend on the basis of § 338 because their guaranty contained a promise to pay all existing and future debts, the recital of consideration referred to future dealings, and they waived notice of dealings between the primary obligor and the guarantee. *See also Black v. O'Haver,* 567 F.2d 361 (10th Cir. 1977) (applying Oklahoma law; defendants not exonerated by amendment of loan agreement because their guaranty permitted "any amendment or modification"). 567 F.2d at 369.

Hope's guaranty as discussed *supra* at pp. 8-10 is continuing and unconditional and, pursuant to the terms of the Guaranty, Hope has consented to all "renewals, extensions and modifications" of the obligation. Consequently, Hope has consented to any alleged alteration of the indebtedness and thus cannot assert, as a matter of law, that he has been exonerated from liability.

5. RESCISSION OF PARTNERSHIP INTEREST (HOPE)

Finally, Hope raises the defense that he is rescinding his partnership interest. However, such rescission has no effect upon his liability to third parties such as FSLIC. Clearly a partner is not released from partnership obligations simply because he retires from the partnership, even if the remaining partners continue the business and assume the obligation among themselves. *Holland Reno Manufacturing Co. v. Homeland Music Co.,* 382 P. 235 (Okla. 1929); *Ellet-Kendall Shoe Co. v. Miller,* 215 P. 417 (Okla. 1923). More significantly, Hope's guaranty is a collateral obligation independent and separately enforceable from that of the principal debtor. *Riverside National Bank v. Manolakis,* 613 P.2d 438, 441 (Okla. 1980). Thus, the status of Hope's relationship, if any, to the Partnership is

irrelevant to his relationship to FSLIC. Regardless of his attempt to rescind his partnership interest, FSLIC is entitled to enforce the guaranty agreement executed by Hope.

Based on the facts and authorities set forth above, there are no genuine issues of material fact involved in the instant case and the FSLIC as receiver for Victor is, therefore, entitled to a judgment as prayed for in the Petition.

Respectfully submitted,

HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON, P.C.

By /s/ R. Mark Petrich

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ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER FOR PLAINTIFF VICTOR SAVINGS AND LOAN ASSOCIATION

ITEM # 5

COURT MINUTE

MOTION DOCKET

September 6, 1989. *C-85-371.* Before the Honorable Sam C. Fullerton, District Judge.

VICTOR SAVINGS & LOAN ASSOC. vs. SOONER VISTA, MIKE BARNETT, JIM BIFFLE, et al. Motion for summary Judgment. Motion for default judgment. Mark Petrick, Attorney appeared for plaintiff. David Nestor, attorney appears for defendants. Motion for Summary Judgment sustained, adopted agreement and authority set out in brief.

ITEM #6

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
SEPT 15 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,	)
Defendants.	)

DEFENDANTS HIRZEL, LITTLE, HELTON, WYNN, SNODDY, BARNETT AND MILLER'S MOTION TO RECONSIDER. COURT'S GRANTING OF FSLIC'S SUMMARY JUDGMENT MOTION

The Defendants, Jeff L. Hirzel, James W. Little, Mike Barnett, John R. Helton, Phillip E. Snoddy, Marvin L. Wynn, and Kenneth E. Miller (collectively referred to as "These Defendants") move this Court, pursuant to Okla. Stat. tit. 12 §651, for a new trial or reconsideration of this Court's granting of the Federal Savings And Loan Insurance Corporation ("FSLC") Motion for Summary Judgment for the following reasons:

1. On September 6, 1989, this Court granted judgment in favor of the FSLIC against These Defendants as well as the Defendants John Steven Hope and Jim Biffle. The Court also granted judgment against Sooner Vista Partnership and a Decree of Foreclosure permitting the sale of a certain condominium given as security for the Sooner Vista Indebtedness.

2. These Defendants request that the Court reconsider its judgment as to their liability as partners and guarantors of the Sooner Vista indebtedness pursuant to Okla. Stat. tit. 12 §651(6) in that this Court's decision is not sustained by sufficient evidence and is contrary to law.

WHEREFORE, these Defendants move this Court for an order denying the FSLIC's Motion for Summary Judgment as to their liability as partners and guarantors of the Sooner Vista indebtedness.

Respectfully submitted,

/s/ Joal R. Hogue

Gene C. Buzzard, OBA #1396
Joel R. Hogue, OBA #11351

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ATTORNEYS FOR DEFENDANTS JEFF L. HIRZEL, JAMES W. LITTLE, MIKE BARNETT, JOHN R. HELTON, PHILIP E. SNOODY, MARVIN L. WYNN AND KENNETH E. MILLER

ITEM #7

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
Oct 3 89

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,

Defendants.

RESPONSE AND OBJECTION TO DEFENDANTS' MOTION TO RECONSIDER COURT'S GRANTING OF FSLIC'S SUMMARY JUDGMENT MOTION

The Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor") submits this Response and Objection to the Motion to Reconsider this Court's Granting of the FSLIC's Motion for Summary Judgment which was filed herein on September 15, 1989, by the Defendants Jeff L. Hirzel, James W. Little, Mike Barnett, John R. Helton, Phillip E. Snoddy, Martin L. Wynn and Kenneth E. Miller (referred to collectively hereinafter as the "Defendants").

I.

INTRODUCTION

On July 14, 1989, the FSLIC as receiver for Victor filed its Motion for Summary Judgment against the Defendants and all other parties involved in this action. The FSLIC as receiver for Victor incorporates herein by reference its Brief in Support of Motion for Summary Judgment. On or about August 15, 1989, the Defendants filed a Response to the FSLIC's Motion for Summary Judgment. Said response of the Defendants was filed after Defendants requested and obtained a continuance of the hearing on the FSLIC's Motion for Summary Judgment

and an extension in which to file Defendants' response. The FSLIC as receiver for Victor consented to said extension and continuance, thus allowing Defendants to fully and completely respond to the FSLIC's Motion for Summary Judgment.

On September 6, 1989, a hearing was conducted by this Court and, after hearing extensive arguments from counsel of the FSLIC as receiver for Victor and the counsel of the Defendants concerning the various claims and defenses involved in this action, this Court granted the FSLIC's Motion for Summary Judgment in its entirety.

In their Motion to Reconsider, the Defendants assert that this Court's decision "is not sustained by sufficient evidence and is contrary to law" and attempt to persuade this Court that the FSLIC's Motion for Summary Judgment should not have been granted because the Defendants assert:

(1) a question of fact exists as to whether Defenddants' liability as general partners of Sooner Vista Partnership was limited to 10% each by the Defendants' execution of their respective guaranty agreement;

(2) a question of fact exists as to whether a novation occurred when Victor Federal Savings and Loan Association ("victor Federal") accepted the renewal note; and

(3) the Defendants were released from all liability by Victor Federal when Victor Federal released Royce Hammons from liability under his respective quaranty agreement (Defendants raise the third proposition in a "Supplement" to Defendants' Brief in Support of Motion to Reconsider filed herein).

As this Court is aware, arguments 1 and 3 above were not raised by Defendants in response to the FSLIC's Motion for Summary Judgment and the Defendants' rationale, arguments and points of authority in support of argument 2 above are likewise new and different than those raised by Defendants in response to the FSLIC's Motion for Summary Judgment.

It is fundamental that a party is not entitled to raise for the first time on a motion for new trial (or motion to reconsider) issues or arguments not previously raised at trial. As stated by the Oklahoma Supreme Court in *Patteson v. Myers,* 83 P.2d 846 (Okla. 1938):

> The failure of a party to avail himself of fair and reasonable opportunity to present and establish claim or defense will afford no basis for new trial in absence of exceptional facts excusing him.

Likewise, the Supreme Court in *Missouri, K. & T. Ry. Co. v. Taylor,* 170 P. 1148 (Okla. 1918) stated:

> A party is entitled to have his day in court; both parties are entitled to this, but neither party is entitled to have more than one fair, reasonable opportunity to establish his claim or defense. To allow more would be to protract litigation to the extent which would preclude the administration of justice.

See, also, Nolan v. Mathis, 272 P. 874 (Okla. 1928).

The Defendants in their Motion to Reconsider raise new arguments and authorities not previously presented in response to the FSLIC's Motion for Summary Judgment despite the fact that Defendants had a fair and reasonable

opportunity to present and establish all defenses and arguments prior to and at the time this Court ruled on the FSLIC's Motion for Summary Judgment. The Defendants have failed to allege any exceptional circumstances which would justify a second opportunity for the Defendants to respond to FSLIC's Motion for Summary Judgment. Consequently, this Court, as a matter of law, should not consider the arguments and authorities raised by Defendants in their Motion to Reconsider!

Nevertheless, as the following illustrates, the new arguments raised by the Defendants in their Motion to Reconsider in an attempt to resist the FSLIC's Motion for Summary Judgment fail as did the arguments and authorities that were raised by Defendants in response to the FSLIC's Motion for Summary Judgment and at the hearing on the FSLIC's Motion for Summary Judgment.

II.

DEFENDANTS' LIABILITY FOR THE DEBT OF SOONER VISTA PARTNERSHIP WAS NOT LIMITED BY THE EXECUTION OF THE GUARANTY AGREEMENTS

Defendants in their Motion to Reconsider assert that multiple contracts involving substantially one transaction must be construed together and that "the only logical and reasonable interpretation of" the promissory note from Sooner Vista Partnership and the guaranty agreements by the Defendants is that all parties intended that the Defendants would only be liable for 10% of the outstanding indebtedness of Sooner Vista Partnership. In support of this argument, the Defendants present two letters signed by Jim H. Biffle ("Biffle"), a general partner with the Defendants, which set forth Biffle's representations to the Defend-

ants that they would only be liable for 10% of the outstanding balance.[1]

The law in Oklahoma is unequivocal that a general partner is jointly liable for all debts and obligations of the partnership. *See* 54 O.S. § 215. There are no exceptions at law to this general rule and it is fundamental that a limited partnership is the appropriate mechanism in which a partner can limit his liability for the debts and obligations of a partnership in which he is a member. *See* 54 O.S. § 148.

The Defendants' argument that the guaranty agreements executed by the Defendants limited their liability to 10% of Sooner Vista Partnership's obligations to Victor Federal is not supported by any legal principle or authority. There is simply no document or agreement executed by Victor Federal that would legally act to limit each of the Defendants' liability to 10%. As set forth in the FSLIC's Brief in Support of its Motion for Summary Judgment and as found by this Court at the hearing on September 6, 1989, *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942), and its progeny estop Defendants from asserting that their liability to the FSLIC is limited since there are no written documents contained in the files of Victor Federal and/or Victor which limit the liability of the Defendants as general partners of Sooner Vista Partnership.

Although Defendants may have been "seeking a mechanism to limit [their] liability" (see Defendants' Brief in Support of their Motion to reconsider), such mechanism

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[1] The letters executed by Biffle were not submitted in response to FSLIC's Motion for Summary Judgment, but more importantly Defendants have never presented any document signed by Victor Federal which purports to limit Defendant's liabaility to 10% of the indebtedness.

was, unfortunately, not properly effectuated by the Defendants. If the Defendants desired to limit their liability in connection with the obligations of Sooner Vista Partnership, the Defendants should have formed a limited partnership and not a general partnership. Contrary to the Defendants' contentions, the FSLIC as receiver for Victor, and the public fund in which it insures, should not suffer a loss on its assests simply because the Defendants claim that they failed to structure Sooner Vista Partnership in a manner consistent with the representations of their partner. Biffle.

III.

THE ACCEPTANCE BY VICTOR FEDERAL OF THE RENEWAL NOTE DOES NOT GIVE RISE TO A NOVATION UNDER OKLAHOMA LAW

Defendants assert in their Brief in Support of Motion to Reconsider that there is a question of fact as to whether a novation occurred when Victor Federal accepted the renewal note. Defendants assert that the validity of the defense of novation turns on the intent of the parties and claim that the FSLIC has presented no evidence that the old indebtedness was *not* satisfied through the excution and acceptance of the renewal note. Defendants also argue that D'Oench, Duhme and its progency does not apply to estop them from asserting the defense of novation herein since the Defendants assert that they are not seeking to diminish the right of the FSLIC to recover the assets of Victor and since the "issue of novation" cannot be answered by reference to the bank's records one way or the other" (See Defendants' Brief in Support of Motion to Reconsider, p. 5).

Defendants in their Brief in Support of Motion to

Reconsider correctly acknowledge that an essesntial element of establishing the defense of novation is showing that the old debt was "extinguished." *See, e.g., Cardwell Investment Company v. United Supply & Manufacturing Company,* 268 F.2d 857 (10th Cir. 1959). It is fundamental that the law limits the manner in which a written promissory note can be extinguished and in which a party can be released from liability thereon. *See generally,* 12(A) O.S. §§ 3-601 -3-606; 15 O.S. § 233. As a general proposition, any such release, absent satisfaction in full or some wrongful act by the holder, must be in writing and signed by the holder thereof. The most common method for extinguishing a promissory note is by marking the original note "Paid" and/or returning said original document to the maker. *See* 12(A) O.S. § 3-605. As this Court found at the hearing on September 6, 1989, the mere acceptance of a renewal promissory note or subsequent note by a holder of a note does not act as an extinguishment or release of the original note under Oklahoma law. *See* cases cited in the FSLIC's Brief in Support of Motion for Summary Judgment at p. 15.

It is undisputed that there is not a written document which purports to extinguish the original note or release the Defendants from liability thereof. Contrary to Defendants' argument, the FSLIC has presented evidence that the original note has not been extinguished. Namely, the original note has never been marked "Paid" or returned to Sooner Vista Partnership or otherwise extinguished pursuant to the requirements imposed by 12(A) O.S. §§ 3-601 - 3-606 or 15 O.S. § 237. Furthermore, contrary to Defendants' argument, the loan files maintained by Victor Federal and Victor are quite clear. There are two promissory notes and nine guaranty agreements in connection with the subject loan, all of which represent assets that the FSLIC succeeded to upon its appointment as receiver for Victor.

There are no ambiguities as to what said loan documents represent.

Notwithstanding the foregoing, the Defendants insist that they should be allowed to conduct a trial and put on evidence in an attempt to establish that the original note was extinguished and a novation occurred when Victor Federal accepted the renewal note. It is unknown to the FSLIC what evidence the Defendants would present to a jury in support of their claim that the original note was extinguished since Defendants have yet to submit or designate any evidence whatsoever other than the renewal note.[2] It is undisputed that there are no written documents contained in the loan files of Victor Federal that evidence Defendants' contention that the original note was extinguished by Victor Federal.

As this Court found on September 6, 1989, the Defendants are estopped pursuant to D'Oench, Duhme and its progeny from asserting defenses in this action that are based on representations or conduct not evidenced by the loan documents themselves. In their Motion to Reconsider, the defendants rely on two cases out of the District Court of Puerto Rico for the proposition that *D'Oench Duhme* is inapplicable herein since Defendants are not attempting to diminish the rights of the FSLIC.[3] The *Prann* and *Rivera-Arroyo* cases cited by the Defendants are distinguishable

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[2] Pursuant to Rule 13 of the Rules of the District Court of Oklahoma, Defendants, in response to FSLIC's Motion for Summary Judgment, have the burden of "showing evidence, not mere contentions which would justify a trial." *See, e.g., American National Bank v. Clarke & Van Wagner, Inc.*, 692 P.2d 61 (Okla. App. 1984). Defendants have yet to present any such evidence.

[3] Defendants rely on the cases of *FDIC v. Prann*, 694 F. Supp. 1027 (D.P.R. 1988) and *FDIC v. Rivera-Arroyo*, 645 F. Supp. 511 (D.P.R. 1986).

from the case at bar and, moreover, are simply not applicable herein.

In *Prann*, the defendant, in defense to the action by the FDIC to enforce a promissory note, alleged that he had been released from liability pursuant to 30 L.P.R.A. § 2560 since a third party had purchased the subject property with the "tacit" consent of the lender. The statute relied upon by the defendants in *Prann* provides in relevant part:

> When a mortgaged property is sold and the seller and the purchaser should have agreed that the buyer shall subrogate himself not only with respect to the liabilities derived from the mortgage but also with respect to the personal obligations secured therein, the seller shall be released from said obligations, if the creditor gives his express or *tacit consent* (emphasis added).

"Tacit consent" is that which is implied or inferred through actions. See Black's Law Dictionary. The foregoing statute is unique to Puerto Rico and there is no similar statute in Oklahoma. The court in *Prann* determined that the bank did in fact give "tacit" consent since the bank accepted payment from the new buyer and engaged in a series of internal transactions of crediting and closing accounts which indicated that the Bank looked to the third party purchaser for repayment. Although the court in *Prann* found that the defendant had been released from liability under the foregoing statute, it is important to note that the court recognized that the facts alleged by the defendant did not give rise to or constitute a defense of novation. The other case cited by Defendants, *Rivera-Arroyo*, involves the same statute set forth above.

The court in *Prann*, in reliance on *FDIC v. Nemecek*,

641 F. Supp. 740 (D. Kan. 1986), held that *D'Oench Duhme* and 12 U.S.C. § 1823(e) was inapplicable because:

> [T]he debt which forms the basis of the asset claimed by FDIC was satisfied *before* FDIC acquired the bank's assets.

The court in *Prann* reasoned that the Defendants were released from their obligation pursuant to the above referenced statute due to the bank's tacit consent and since such release occurred prior to the FDIC's acquisition of the bank, the FDIC did not receive said asset. The rationale of *Nemecek* and *Prann* is suspect and not applicable herein.[4]

Two years after the District Court of Kansas ruled in *Nemecek,* the District Court of Kansas in *FDIC v. Cover,* 714 F. Supp. 455 (D. Kan. 1988), rejected the rationale set forth in *Nemecek* and *Prann* since the court found that such rationale:

> [R]equires the court to, in a preliminary step, look to evidence not permitted by § 1823(e) to determine the FDIC's rights with respect to each item reflected in a failed bank's books as an asset and purchased by the corporation. Such a theory would destroy the effect and protection of § 1823(e) and hamper the FDIC's ability to follow the purchase and assumption alternatives by injecting uncertainty into the valuation of assets.

The court in *Cover* relied extensively on the United States Supreme Court opinion in *Langely* and the underlying

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[4] Although *Prann* was decided in 1988, the District Court of Puerto Rico oddly enough does not cite or rely on *Langley v. FDIC.*, 484 U.S. 86 (1987) which is the most recent construction of D'Oench, Duhme and 12 U.S.C. § 1823(e) by the United States Supreme Court.

policies of *D'Oench, Duhme* to reject the rationale set forth in *Nemecek* and *Prann. See also FDIC v. P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987); *FDIC v. P.L.M. International, Inc.*, 834 F.2d 248 (1st Cir. 1987); *FDIC v. Hoover-Morris Enterprises*, 642 F.2d 785. (5th Cir. 1981).

As set forth above, there are no documents or evidence meeting the requirements of *D'Oench, Duhme* or 12 U.S.C. § 1823(e) which purport to extinguish the original note for purposes of establishing the defense of novation under Oklahoma law. As a result, the Defendants must be estopped from asserting that a novation occurred pursuant to *D'Oench, Duhme* and its progeny. The Defendants are simply attempting to go outside the loan documents, contrary to the well founded principle of *D'Oench, Duhme,* in an attempt to relieve themselves from liability. To allow Defendants to do such would wholly undermine and destroy the *D'Oench, Duhme* doctrine.

IV.

DEFENDANTS WERE NOT RELEASED FROM LIABILITY AS A RESULT OF THE EXECUTION OF THE SUBROGATION AGREEMENT BETWEEN VICTOR FEDERAL AND ROYCE HAMMONS

Defendants in their Supplement to their Brief in Support of Motion to reconsider assert that they were released by Victor Federal from all liability as a result of a certain Subrogation Agreement executed between Royce Hammons ("Hammons") and Victor Federal dated July 25, 1985. A copy of said Subrogation Agreement is attached hereto as Exhibit "A". In support of such argument, Defendants rely on the case of *Wade v. Tapp,* 285 P.2d 377

(Okla. 1955).[5] The purpose of the rule announced in *Tapp* is to preserve the right of contribution among joint obligors. The argument of the Defendants that the Subrogation Agreement releases them from all liability to the FSLIC fails since said agreement does not release Hammons as a general partner of Sooner Vista Partnership and since said agreement is not a true release but instead a substitution of liability under the guaranty.

The Subrogation Agreement between Hammons and Victor Federal provides in pertinent part:

> Victor hereby releases Hammons from all claims which might be asserted at any time from any and all obligations which are imposed upon Hammons in favor of Victor *pursuant to the guaranty recited above* and covenants that it will deliver to Hammons forthwith the originalguaranty executed by Hammons "Cancelled" and "Released" . . . (Emphasis added)

See Exhibit "A" attached hereto. As such, Victor Federal only released Hammons from liability as a guarantor and not as a general partner of Sooner Vista Partnership. Consequently, there was not a release of Hammons for the joint obligation that he may have with the Defendants which would act as a release of the Defendants under the law announced in *Tapp*.

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[5] The Oklahoma Supreme Court in *Tapp* applied the old common law rule that a release of one joint debtor releases all joint debtors in the absence of an express reservation of right to proceed against the other joint debtors. Although the Oklahoma Supreme Court has not had an opportunity to address said issue in recent years, the modern view adopted by most jurisdictions today is that a release of one joint debtor does not effect the liability of other joint debtors unless it is the intent of the parties to release all or if the injured party has received full compensation for his claim. *See generallly,* 66 AM. JUR.2d. *Release* § 35.

Moreover, the subrogation agreement is not a true release as contemplated by the Oklahoma Supreme Court in *Tapp*. Instead, the Subrogation Agreement provides for a substitution of obligors (i.e., Hope to take over the Hammons' liability under his respective guaranty agreement). The Subrogation Agreement simply does not affect Defendant's right to contribution against Hammons and/or his successor, Hope. Consequently, the Defendants' argument that they, as joint obligors with Hammons, have been released from all liability as a result of the Subrogation Agreement must fail as a matter of law.

Even in the event this Court somehow finds that the Subrogation Agreement acts as a release of Hammons as general partner of Sooner Vista Partnership and that said release also acts as a release of all joint obligors (i.e., the Defendants as general partners of Sooner Vista Partnership), the Defendants are still liable as guarantors of the debt of Sooner Vista Partnership pursuant to their respective limited guaranty agreements. It is fundamental that a guarantor is not released from liability under an unconditional and continuing guaranty agreement simply because a co-guarantor is released as long as consent to said release is given. *See, e.g., United States v. Vahlco Corp.*, 800 F.2d 462 (5th Cir. 1986).

Each guaranty executed by the Defendants is a separate and independent obligation and contract and each guaranty provides, in part:

> This guaranty shall be absolute, unconditional and continuing and shall be binding upon the undersigned, heirs of the undersigned, and the estate or estates of the undersigned, notwithstanding the death of any of the undersigned or of any guarantor or any other party liable upon

> any in debtedness or other obligation hereby guaranteed. *Any one or more of the undersigned or any party liable upon any indebtedness or other obligation hereby guaranteed may be released without effecting the liability hereunder of any of the undersigned or any other party not so release.* (Emphasis added).

As a result, the Subrogation Agreement does not affect the liability of the Defendants pursuant to their respective guaranty agreement in any way whatsoever. Each of the defendants' guaranty agreements are unconditional and are enforceable as separate instruments despite the fact that Victor Federal may have released Hammons from liability under his guaranty agreement.

V.

CONCLUSION

Based on the foregoing arguments and authorities, the Defendants' Motion to Reconsider this Court's Granting of the FSLIC's Motion for Summary Judgment should be denied.

Respectfully submitted,

HALL, ESTILL, HARDWICK,
GABLE, GOLDEN & NELSON, P.C.

By /s/ R. Mark Petrich

William D. Nay, OBA #6588
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(918) 588-2700

ATTORNEYS FOR FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER FOR PLAINTIFF VICTOR SAVINGS AND LOAN ASSOCIATION

ITEM 8

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
11-13-89

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	CASE NO. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) and Oklahoma general partnership: et al.,	)	
Defendants.	)	

ORDER

The Defendants' Hirzel, Little, Helton, Wynn, Snoddy, Barnett, and Miller Motion to Reconsider the Court's granting of FSLIC's Motion for Summary Judgment and the Response thereto came on for hearing before said Court at its regular Motion Docket on November 1, 1989. The Defendants appear by their attorney, Joel R. Hogue, and the Plaintiff (Respondent) appears by its attorney, R. Mark Petrich.

Since the initiation of this action, Victor Savings and Loan Association was declared insolvent by the Federal Home Loan Bank Board and the Federal Savings and Loan

Insurance Corporation ("FSLIC") was appointed as Receiver.

This matter was heard before this Court on September 6, 1989, and at that time the Court granted judgment in favor of the FSLIC against Sooner Vista and also decreed the foreclosure of the real estate securing the indebtedness. In addition, the Court granted judgment against These Defendants, as well as John Steven Hope and Jim Biffle, for percentages of liability set forth in certain guaranty agreement executed by These Defendants and Hope and Biffle and, also granted judgment against These Defendants and Hope and Biffle for any indebtedness of Sooner Vista to the FSLIC that is not discharged through the sale of all partnership assets, most notably the condominium securing the indebtedness.

The Defendants maintain that the Court erred in granting judgment against These Defendants either as partners or as guarantors of the indebtedness for at least two reasons. First, the Court erred in failing to limit the liability of the partners to the percentages set forth in certain guaranty agreements because the obvious intention, as indicated by a proper interpretation of the writings executed by the parties, is that the guaranty agreements were executed for the purpose of limiting the individual partners' liability to the percentages set forth in their respective guaranty agreements. Second, there are material questions of fact remaining regarding whether the execution of a second promissory note by Jim Biffle operated as a novation which would have the effect of substituting Biffle, or the new Sooner Vista partnership composed of Biffle and Hope, for and in the place of These Defendants, who by that time were no longer partners in Sooner Vista.

In addition to the above, the Defendants maintain in a Supplement to their Brief in Support of the Motion to reconsider that Plaintiff's Motion for Summary Judgment should be denied for the further reason that one of the partners, Royce Hammons, was released from liability by Victor Federal Savings and Loan Association on January 14, 1985. They maintain that the Release by Victor of Hammons on his liability also constitutes a release of the other partners including These Defendants.

Both sides of all issues have been well briefed by counsel and the Court finds that further recitation of the facts is unnecessary. The facts are basically undisputed. The partners ("These Defendants") allege two defenses:

1. Release,

2. Novation,

in addition to the defense asserted above.

The Court in granting Plaintiff's Motion for Summary Judgment relied upon the doctrine established in the case of *D'Oench, Duhme & Company v. F.D.I.C.*, 315 U.S. 447 (1942), and 12 U.S.C.A. Section 1823(e). This principle prevents and estops those who execute and deliver promissory notes and/or guaranties to federally insured banks from raising defenses against a bank's duly appointed Receiver based on oral agreements with officers of failed banks.

The Court finds that based upon the D'Oench - Duhme Doctrine, the defenses raised by the partners are insufficient as a matter of law.

The Court further finds and reaffirms that there are

no substantial fact questions raised by the Defendants in their Motion to Reconsider that would justify submitting this case to a jury, and that by reason thereof, the Defendant's Motion to Reconsider should be denied.

The Court would further adopt the argument and authority of the Plaintiff in all of its briefs on file herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion to Reconsider be and the same is hereby denied, to which ruling the Defendants are granted an exception.

DATED this 8th day of November, 1989.

/s/ Sam C. Fullerton

SAM C. FULLERTON
District Judge

CERTIFICATE OF MAILING

I hereby certify that I did mail a true and correct copy of the above and foregoing Order via prepaid first class mail on this 8th day of November, 1989, to the following interested parties, to-wit:

Mr. Joel R. Hogue, Attorney at Law, GABLE & GOTWALS, P.C., 2000 Fourth National Bank Building, 15 West Sixth Street, Tulsa, Oklahoma 74119-1217;

Mr. Robert Jenkins, Assistant District Attorney Delaware County Courthouse, Whitehead and Krause Streets, P. O. Box 309, Jay, Oklahoma 74346;

Mr. Jim Biffle, 7524 South Harvard Place, Tulsa, Oklahoma 74136;

Mr. James R. Hicks, Attorney at Law, MORRELL & WEST, 1717 South Boulder Street, Suite 800, Tulsa, Oklahoma 74119;

Mr. Dale F. McDaniel, 2250 East 73rd Street, Suite 200, Tulsa, Oklahoma 74136;

Mr. Mark Petrich, Attorney at Law, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172.

/s/ Lynner L. Tomlin

ITEM #9

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
JAN 3 1990

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; MIKE BARNETT, (individually, and as partner of Sooner Vista); JIM H. BIFFLE, (individually and as partner of Sooner Vista); JOHN R. HELTON (individually and as partner of Sooner Vista); JEFF L. HIRZEL (individually and as partner of Sooner Vista); JAMES W. LITTLE (individually and as partner of Sooner Vista); KENNETH E. MILLER (individually and as partner of Sooner Vista); PHILLIP E. SNODDY (individually and as partner of Sooner Vista) MARVIN L. WYNN (individually and as partner of Sooner Vista); JOHN STEPHEN HOPE (individually and as partner of Sooner Vista);	)	

COUNTY TREASURER OF DELAWARE COUNTY: BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY,

Defendants.

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing this 6th day of September, 1989, on the Motion for Summary Judgment filed by the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Victor Savings and Loan Association ("Victor"), successor in interest to Victor Federal Savings and Loan Association ("Victor Federal"). The FSLIC as receiver for Victor appears by and through its attorneys, Hall, Estill, Harwick, Gable, Golden & Nelson, P.D., by R. Mark Petrich. The Defendants Jeff L. Hirzel, ("Hirzel"), James W. Little ("Little"), Mike Barnett ("Barnett"), John R. Helton ("Helton"), Phillip E. Snoddy ("Snoddy"), Marvin L. Wynn ("Wynn") and Kenneth E. Miller ("Miller"), appear by and through their attorneys of record, Gable & Gotwals, P.C., by Joel R. Hogue. The Defendant Charles J. Davis ("Davis") appears by and through his attorney Dale F. McDaniel. The Defendants Sooner Vista Partnership, Jim Biffle ("Biffle"), John Stephen Hope ("Hope") and Shangri-La Vista Towers Homeowners Association appear not. The Court, having heard oral arguments of counsel and being fully advised in the premises, finds that the Motion for Summary Judgment of the FSLIC as receiver for Victor should be sustained in its entirety and finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties herein.

2. On or about May 13, 1983, Sooner Vista Partnership executed and delivered to Victor Federal a promissory note in the principal sum of $217,843.21 (the "Note").

3. On the date Sooner Vista Partnership executed and delivered the Note to Victor Federal, the partnership was made up of the following general partners, to-wit: Barnett, Biffle, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Royce Hammons ("Hammons").

4. On May 13, 1983, Sooner Vista Partnership, for purposes of securing payment of the Note, executed and delivered to Victor Federal a certain mortgage in and to the following described real property, to-wit:

> Unit 1010 of Shangri-La Vista Towers, a unit ownership estate according to the recorded declaration and plan thereof, in an undivided 1.10% interest in and to the common elements and appurtenances thereto belonging, all according to and more particularly described and shown in the Declaration of Unit Ownership Estate and Bylaws of Shangri-La Vista Towers, recorded January 12, 1981, in Book 410, pages 138-163, inclusive, in the office of the County Clerk, Delaware County, Oklahoma.

5. On or about May 13, 1983, Barnett, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Hammons executed and delivered to Victor Federal written guaranty agreements, whereby each of the said parties unconditionally guaranteed payment of 10% each of the original loan of $214,200 plus closing costs estimated to be $5,000. On or about May 13, 1983, Biffle executed and delivered to Victor Federal a written guaranty agreement whereby he unconditionally guaranteed payment of 20% of the original loan of $214,200 plus closing costs estimated to be $5,000.

6. On or about January 14, 1985, Hope became a partner in Sooner Vista Partnership and, for good and valuable consideration, executed and delivered to Victor Federal a guaranty agreement whereby he unconditionally guaranteed payment of 10% of the original loan of $214,200 plus closing costs estimated to be $5,000.

7. On or about March 13, 1985, Biffle executed and delivered to Victor Federal a renewal promissory note (the "Renewal Note") which incorporated the balance of Sooner Vista Partnership's indebtedness under the Note plus closing costs and accrued interest.

8. Upon receipt of the Renewal Note, Victor Federal did not mark the Note paid or return the Note to Sooner Vista Partnership or otherwise release Sooner Vista Partnership from liability under the Note.

9. On March 13, 1987, the Federal Home Loan Bank Board ("FHLBB") appointed the FSLIC as receiver for Victor Federal and on that same date the FHLBB chartered Victor and substantially all assets of Victor Federal, including the Note, mortgage, guaranty agreements and Renewal Note described above were transferred to Victor.

10. On July 28, 1988, the FHLBB appointed the FSLIC as receiver for Victor and, as receiver, the FSLIC succeeds to all rights, titles, interests and privileges of Victor.

11, That on or about July 25, 1985, Hammons was released from liability under his guaranty agreement by Victor Federal, but neither Sooner Vista Partnership, Barnett, Biffle, Helton, Little, Miller, Snoddy, Wynn nor Hope were released from liability by Victor Federal or Victor.

12. That the Note, Renewal Note and guaranty agreements are in default and, despite demand, Sooner Vista Partnership, Barnett, Biffle, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Hope have failed to pay the amounts outstanding under the Note or Renewal Note pursuant to the terms and conditions of said instruments and the following amounts are now outstanding pursuant to said instruments:

Principal	$228,205.04
Interest through November 18, 1988	$ 60,752.46
Interest from November 19, 1988 until paid	$ 49.92 per diem
Late Charges through November 18, 1988	$ 3,422.40
Abstracting and Maintenance Expenses	$ 1,962.43

13. That the Defendants Biffle, Barnett, Helton, Hirzel, Little, Miller, Snoddy, Wynn and Hope are estopped pursuant to *D'Oench Duhme & Company v. FDIC*, 315 U.S. 447 (1942) and its progeny, from asserting that they have had their liability limited or that they have been released from liability under the Note, the Renewal Note or their respective guarantees. The other defenses raised by Hope (i.e., lack of acknowledgement on the guaranty, change in the underlying obligation and recission of partnership interest) fail as a matter of law.

14. That the FSLIC as receiver for Victor should be granted judgment *in personam* and *in rem* against Sooner

Vista Partnership, a partnership which, at the time the indebtedness was incurred, was composed of Hammons, Barnett, Biffle, Helton, Hirzel, Little, Miller, Snoddy and Wynn, for the sum set forth above together with all costs of this action including a reasonable attorney's fee of $20,000 and for all of which let execution issue against said partnership and, if the property of Sooner Vista Partnership be insufficient to satisfy the judgment, then let execution issue against the individuals composing said partnership, except Hammons, until said judgment is satisfied in full.

15. That the FSLIC as receiver for Victor should be granted judgment *in personam* and *in rem* against each Hope, Barnett, Biffle, Helton, Nirzel, Little, Miller, Snoddy and Wynn for 10% each of the original loan of $214,000 plus closing costs which totals $217,843.21 pursuant to the guaranty agreements executed by said parties.

16. That the FSLIC as receiver for Victor has a first lien on the real property described above and should be granted judgment *in rem* against all Defendants and parties named herein, foreclosing its superior mortgage in and to the real property described above.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the FSLIC in its capacity as receiver for Victor have and recover a judgment *in personam* and *in rem* against Sooner Vista Partnership for the principal sum of $228,205.04 plus accrued interest through November 18, 1988, of $60,752.46, together with continuing interest from November 19, 1988, until paid at the rate of $49.92 per diem, together with late charges of $3,422.40, plus all costs of this action including a reasonable attorney's fee of $20,000 and abstracting and maintenance expenses of $1,962.43.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Mike Barnett, Jim Biffle, John R. Helton, Jeff L. Hirzel, James W. Little, Kenneth B. Miller, Phillip E. Snoddy and Marvin L. Wynn, as general partners of Sooner Vista Partnership, are jointly liable for the portion of the judgment entered herein against Sooner Vista Partnership which is not satisfied through the assets of said partnership.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the FSLIC as receiver for Victor have and recover a judgment *in personam* against John Stephen Hope, Mike Barnett, John R. Helton, Jeff L. Hirzel, James W. Little, Kenneth B. Miller, Phillip E. Snoddy and Marvin L. Wynn, for a sum equal to 10% each of $217,843.21 and a judgment *in personam* against Jim Biffle for a sum equal to 20% of $217,843.21.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the FSLIC as receiver for Victor has a valid first lien on the real property described above, securing the judgment entered herein in the principal sum of $228,205.04 plus interest, costs and attorney's fee as set forth above, which is prior to the rights, titles, interests and liens of all Defendants and parties herein and, therefore, is entitled to a judgment *in rem* against all Defendants foreclosing said first lien.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the rights, titles, interests and liens of all parties herein be foreclosed upon the real property described above and, upon a praecipe being filed, that a special execution and order of sale shall be issued by the Clerk of this Court, directing the Sheriff of Delaware County, Oklahoma to levy upon, advertise and sell the above described real property after due and legal appraise-

ment, and to pay the proceeds of such sale to the Clerk of this Court for application and distribution as hereinafter set out.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the order of priority of liens of the parties and the order of the distribution of proceeds of the sale are as follows: (a) first to the payment of delinquent ad valorem taxes due the County Treasurer of Delaware County, Oklahoma; (b) second to the payment of all costs and attorney fees incurred herein by Victor or the FSLIC as receiver for Victor; (c) third to the payment of the judgment lien of the FSLIC as receiver for Victor in the sum of $228,205.04 plus accrued and accruing interest; (d) fourth the balance, if any, to be paid to the Clerk of this Court to await the further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that, upon confirmation of the sale of the above described real property, each and every party herein shall be forever barred, foreclosed and enjoined from asserting their claim in any right, title, interest estate or equity redemption in and to said premises or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that, upon confirmation of the said sale, the Sheriff of Delaware County, Oklahoma shall execute and deliver a good and sufficient deed to the premises to the purchasor thereof, conveying all right, title, interest estate and equity redemption of each of the parties herein and each and all parties claiming under them since the filing of the Petition in this suit, and in and to the real estate described above and that upon application of the purchaser, the Clerk of this Court shall issue a writ of assistance to the Sheriff of Delaware County, Oklahoma

who shall thereupon and forthwith place said premises in full and complete possession and enjoyment of said purchaser.

/s/ Sam C. Fullerton
Judge of the District Court

Delaware County, Oklahoma, this 17th day of January, 1990
by /s/Dana J. Crouch - Deputy

Judy E. Larmon
Court Clerk

ITEM 10

CERTIFICATE OF RECORD ON APPEAL

FILED
5-21-90

State of Oklahoma)
County of Delaware) ss CERTIFICATE

I, Judy E. Larmon, Court Clerk, State of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete record, and contains all of the pleadings, motions orders, journal entries, instructions and all pleadings designated to be included in the Record on Appeal in Case No. C-85-371 styled *Victor Federal Savings & Loan Assn.* VS *Jim H. Biffle, et al*

That the pleadings are the original pleadings as filed in my office in said case, and are as set out in the Index hereto attached, and the same are the original pleadings as filed on the dates set forth in the filing stamps attached thereto, and as set forth in the index and attached hereto.

Witness my hand this 21st day of May 1990.

JUDY E. LARMON, Court Clerk

/s/ DAna J. Crouch
deputy

92-1127

NO.

FILED
DEC 22 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN R. HELTON, JEFF L. HIRZEL,
JAMES W. LITTLE, PHILIP E. SNODDY,
MARVIN L. WYNN,
Each, Individually and as a partner of
Sooner Vista, a partnership,

PETITIONERS,

v.

F.D.I.C., Receiver for Victor
Savings and Loan Association,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION 4,
STATE OF OKLAHOMA

APPENDIX B
VOLUME II

R. M. HELTON
Counsel for Petitioners
713 Lamar Street
Wichita Falls, Texas 76301
Tel. 817-723-0729, 817-766-2828

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

65pp

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APPENDIX B

ITEM #1

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
JUL 30 1990

MIKE BARNETT, JOHN R. HELTON, JEFF L. HIRZEL, JAMES W. LITTLE, KENNETH E. MILLER, PHILLIP E. SNODDY, MARVIN L. WYNN, Each, individually and as a partner of Sooner Vista, a partnership,	)	No. 74513
APPELLANTS	)	
versus	)	
VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
APPELLEE	)	

FIRST AMENDED PETITION IN ERROR
(AND PRELIMINARY STATEMENT)

A. TRIAL COURT HISTORY

COURT: District CASE NO. C-85-371

COUNTY: Delaware JUDGE: Hon. Sam C. Fullerton

DATED JUDGMENT OR ORDER APPEALED PRONOUNCED:

November 8, 1989

POST TRIAL MOTION

(Kind)	(Date)
Motion to Reconsider the Order of September 6, 1989, sustaining plaintiff's Motion for Summary Judgment, and granting judgment, *in solido,* against appellants	September 15, 1989

DATE OF DIPOSITION OF POST-TRIAL MOTION

(Kind)	(Date)
Order Refusing to Reconsider	November 8, 1989

B. DISPOSITION IN TRIAL COURT

NATURE OF JUDGMENT OR ORDER APPELLANTS SEEK TO REVERSE: Order refusing to reconsider the Order orally uttered on September 6, 1989, sustaining plaintiff's motion for summary judgment and granting judgment, *in solido*, against appellants.

RELIEF SOUGHT BY APPELLANTS: By a timely filed Motion to reconsider, appellants sought an Order that, if granted, would have corrected as alleged harmful error in the order, orally uttered on September 6, 1989, sustaining plaintiff's motion for summary judgment, and granting judgment, *in solido,* against appellants. Appellants contended that the judgment *in solido* should have been a judgment *pro rata* and was, therefore not sustained by sufficient evidence and was contrary to law.

RELIEF GRANTED: The trial court refused to grant appellants any relief.

RELIEF SOUGHT BY APPELLEE: It requested the trial court to refuse to grant appelants any relief.

RELIEF GRANTED: The trial court agreed with appellee's request and refused to grant appellants any relief.

Attached as Exhibit "A" is a certified copy of the Order Refusing to Reconsider and correct the Orders of September 6, 1989.

C. SUMMARY OF CASE

It is summarized in Exhibit "B" attached herein and made a part hereof.

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

They are stated in Exhibit "C" attached hereto and made a part hereof.

ANY RELATED OR PRIOR APPEALS

Yes

This Petition in Error is related to the Petition in Error filed in this Court on February 1, 1990. Its style is the same. Its Supreme Court file number is 74892

E. ARE APPELLANTS WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY?

NO

F. ARE APPELLANTS AGREEABLE TO ACCELERATED PROCEDURES FOR THIS APPEAL UNDER COURT RULE?

(Fast Track) NO

Why the appellants are not agreeable is specified in Exhibit "D" attached hereto.

G. NAME OF COUNSEL

(With telephone number and address)

ATTORNEY FOR APPELLANTS

Name:	R. M. Helton, OBA # 4066
Firm:	Solo Practitioner,
Address:	713 Lamar Street, Wichita Falls, TX, 76301
Telephone:	817-723-0729

ATTORNEY FOR APPELLEE

Name:	William D. Nay, OBA # 6588 R. Mark Petrich, OBA # 11956
Firm:	Hall, Estill, Mardwick, Cable, Golden & Nelson, P.C.
Address:	4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, OK, 74172-0154
Telephone:	918-588-2700

H. DATE: July 30th, 1990.

Verified by:

/s/ R. M. Helton

R. M. Helton,
Solo Practitioner,
713 Lamar Street,
Wichita Falls, TX 76301
817-723-0729

I. AFFIDAVIT OF SERVICE TO APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT

I hereby certify that a true and correct copy of the above and foregoing First Amended Petition in Error was hand delivered on the 31 day of July, 1990, to William D. Nay and R. Mark Petrich, Esquires, 4100 Bank of Oklahoma Tower, 1 Williams Center, Tulsa, OK, 74172-0154, by depositing it in the U.S. Mails, postage prepaid.

I further certify that copy of the above and foregoing First Amended Petition in Error was filed in the Office of the Court Clerk of Deleware County on the 1st day of August, 1990.

/s/ R. M. Helton

R. M. Helton,
counsel aforesaid.

Exhibit "A", attached to the First Amended Petition In Error and Preliminary Statement.

(Copy of Certified Copy of the Order in Question. Original Certified Copy annexed to the Original Petition in Error.)

Three Pages

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED
NOV 13 1989

VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. C-85-371
SOONER VISTA, (a/k/a Sooner Vista Partnership) an Oklahoma general partnership; et al.,	)	
Defendants.	)	

ORDER

The Defendants, Hirzel, Little, Helton, Wynn, Snoddy, Barnett, and Miller, Motion to Reconsider the Court's granting of FSLIC's Motion for Summary Judgment and the Response thereto came on for hearing before said Court at its regular Motion Docket on November 1, 1989. The Defendants appear by their attorney, Joel R. Hogue, and the Plaintiff (Respondent) appears by its attorney, R. Mark Petrich.

Since the initiation of this action, Victor Savings and Loan Association was declared insolvent by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as Receiver.

This matter was heard before this Court on September 6, 1989, ans at that time the Court granted

judgment in favor of the FSLIC against Sooner Vista and also decreed the foreclosure of the real estate securing the indebtedness. In addition, the Court granted judgment against These Defendants, as well as John Steven Hope and Jim Biffle, for percentage of liability set forth in certain guaranty agreements executed by These Defendants and Hope and Biffle and, also granted judgment against These Defendants and Hope and Biffle for any indebtedness of Sooner Vista to the FSLIC that is not discharged through the sale of all partnership assets, most notably the condominium securing the indebtedness.

The Defendants maintain that the Court erred in granting judgment against These Defendants either as partners or as guarantors of the indebtedness for at least two reasons. First, the Court erred in failing to limit the liability of the partners to the percentages set forth in certain guaranty agreements because the obvious intention, as indicated by a proper interpretation of the writings executed by the parties, is that the guaranty agreements were executed for the purpose of limiting the individual partners' liability to the percentages set forth in their respective guaranty agreements. Second, there are material questions of fact remaining regarding whether the execution of a second promissory note by Jim Biffle operated as a novation which would have the effect of substituting Biffle, or the new Sooner Vista Partnership composed of Biffle and Hope, for and in the place of These Defendants, who by that time were no longer partners in Sooner Vista.

In addition to the above, the Defendants maintain in a Supplement to their Brief in support of the Motion to Reconsider that Plaintiff's Motion for Summary Judgment should be denied for the further reason that one of the partners, Royce Hammons, was released from liability by Victor Federal Savings and Loan Association on January 14, 1985. They maintain that the Release by Victor of

Hammons on his liability also constitutes a release of the other partners including These Defendants.

Both sides of all issues have been well briefed by counsel and the Court finds that further recitation of the facts is unnecessary. The facts are basically undisputed. The partners ("These Defendants") allege two defenses:

1. Release,
2. Novation,

in addition to the defense asserted above.

The Court in granting Plaintiff's Motion for Summary Judgment relied upon the doctrine established in the case of *D'Oench, Duhme & Company v. F.D.I.C.*, 315 U.S. 447 (1942), and 12 U.S.C.A. Section 1823(e). This principle prevents and estops those who execute and deliver promissory notes and/or guaranties to federally insured banks from raising defenses against a bank's duly appointed Receiver based on oral agreements with officers of failed banks.

The Court finds that based upon the D'Oench-Duhme Doctrine, the defenses raised by the partners are insufficient as a matter of law.

The Court further finds and reaffirms that there are no substantial fact questions raised by the Defendants in their Motion to Reconsider that would justify submitting this case to a jury, and that by reason thereof, the Defendant's Motion to Reconsider should be denied.

The Court would further adopt the argument and authority of the Plaintiff in all of its briefs on file herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion to Reconsider be and the same is hereby denied, to which ruling the Defendants are granted an exception.

DATED this 8th day of November, 1989.

/s/ Sam C. Fullerton

SAM C. FULLERTON
District Judge

CERTIFICATE OF MAILING

I hereby certify that I did mail a true and correct copy of the above and foregoing Order via prepaid first class mail on this 8th day of November, 1989, to the following interested parties, to-wit:

Mr. Joel B. Hogue, Attorney at Law, GABLE & GOTWALS, P.C., 2000 Fourth National Bank Building, 15 West Sixth Street, Tulsa, Oklahoma 74119-1217;

Mr. Robert Jenkins, Assistant District Attorney, Delaware County Courthouse, Whitehead and Krause Streets, P. O. Box 309, Jay, Oklahoma 74346;

Mr. Jim Biffle, 7524 South Harvard Place, Tulsa, Oklahoma 74136;

Mr. James Hicks, Attorney at Law, MORRELL & WEST, 1717 South Boulder Street, Suite 800, Tulsa, Oklahoma 74119;

Mr. Dale F. McDaniel, 2250 East 73rd Street, Suite 200, Tulsa, Oklahoma 74136;

Mr. Mark Petrich, Attorney at Law, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172.

Delaware County, /s/ Lynna L. Tomlin

5th day of December, 1989.

Deputy

EXHIBIT "B", attached to the first amended Petition in Error and Preliminary Statement.

This action was filed by a solvent Thrift, the first lender. It was a suit to foreclose on a partnership real estate mortgage and for debt arising from the partnership mortgage note and nine so-called 'guaranty agreements' signed by the nine partners of the borrower. Appellants are seven of the original nine partners. The first Thrift became insolvent. A 'take-over' new Thrift was substituted as plaintiff. It (Victor S. & L. Assn.) became insolvent and FSLIC, as its receiver, became the third substantial plaintiff.

FSLIC, receiver, the appellee, amended the original petition. Appellee alleged its federal status. No substantial change in the original claim was stated, except the 'status' of the promisors in the nine guaranty agreements were alleged to have been as 'individuals' and not as 'partners'.

Appellee filed a motion for summary judgment *on its amended petition.* The motion was made under Rule 13 of the District Court Rules. The motion was supported by a *brief.* The brief contained exhibits. The brief extensively cited the following federal laws: the FSLIC Insurance Act of 1938, as amended; 12 U.S.C. § 1823(e), a part of the FDIC Insurance Act of 1950, as amended; *D'Oench Etc.,* a U.S. Supreme Court case; numerous U.S. District and Circuit Court opinions. The brief contended that *all* 'defenses' available to appellants under state law were by this mass of federal law, barred. Appellee in its briefs contended that the term 'defenses' included the question of *intended* liability of appellants and intended 'status' of appellants as promisors in the nine 'guaranty' agreements. That is, that such questions as the *intent* of the contracting parties as reflected from the *loan papers sued on* was a 'barred

defense' by the cited federal law. *Summarily,* the trial court agreed and held that as a matter of this federal law that there were no disputable genuine material questions of fact. The trial court granted a summary judgment against appellants for *all* relief appellee sought. The trial court refused to reconsider appellants' request for corrected relief. This appeal followed.

EXHIBIT "C", attached to the Amended Petition in Error and Preliminary Statement.

Errors proposed to be raised on appeal.

1. The trial court erred in granting the appellee a summary judgment on September 6, 1989.

2. The trial court erred in overruling appellants' motion to reconsider on November 8, 1989.

3. These errors were fundamental, constitutional law errors.

4. These trial court errors invaded appellants' state and federal due process rights under Amendments numbered V and XIV, U.S. Constitution, and Art. 2, § 7, Oklahoma Constitution.

5. These trial court errors invaded appellants' rights under Art. VI and Amendments VII and X, U.S. Constitution, and Art. 2, § 19, Oklahoma Constitution.

Issues proposed to be raised on appeal.

Threshold Issue:

Whether or not the interlocutory finding/order of the trial court, made on September 6, 1989, was jurisdictionally null and void:

1. because the trial court never had any federal law claim and its remedy as the subject matter of its jurisdiction in the exercise of its federally conferred concurrent federal law jurisdiction; and/or,

2. because the trial court was never authorized by federal law to limit the scope of Oklahoma law's object to be achieved by Rule 13 [summary judgment rule] and the trial court's mandatory duty under the rule to determine whether there was any genuine, material disputed facts on issues essential to appellee's right to a summary judgment under Oklahoma law.

Ultimate Issue:

Whether or not the summary judgment granted in this case on September 6, 1989, was the poisoned fruit of a state and federal unconstitutionally null and void interlocutory finding/order of the trial court, made on September 6, 1989, that precluded the appellants from the use of all of their state law claim?

Specific constitutional law issues:

A. Whether the right to jury trial, guaranteed to the appellants by Amendment VII, Bill of Rights, U.S. Constitution, and Art. 2, § 19, Oklahoma Constitution, has, by the trial court, been denied to the appellants?

B. Whether appellants' right to trial by an Oklahoma trial court that would exercise all judicial power reserved to Oklahoma by Amendment X, Bill of Rights, U.S. Constitution, has, by the trial court, been denied to the appellants? This issue arises from the fact that the trial court refused to determine the intention of the parties to the loan contracts sought to be enforced by the appellee. The upward ultimate source of this failed judicial duty had its origin in Amendment X.

C. Whether appellants' right to the benefits of a trial court that would apply and enforce the supreme court of the land guaranteed to appellants under Art. VI, U.S. Constitution, has, by the trial court been denied to appellants? The trial court in making the interlocutory finding/order and its resulting summary judgment disregarded and did not enforce Amendments V and VII of the Bill of Rights and Amendment XIV, U.S.. Constitution, and thereby failed to enforce the supreme law of the land, commanded by Art. VI.

D. Whether state and federal procedural and substantive due process of law has, by the trial court, been denied to appellants by the following itemized acts of the trial court:

1. The trial court never determined the intention of the parties to the contracts sued on under Oklahoma law.
2. The trial court never determined whether there was any genuine material disputed questions of fact surrounding that intent—an essential element of appellee's prima facie case under Oklahoma law.
3. The trial court determined that federal law precluded it from deciding either question—that is, intent as a 'merit' trial question or intent as a summary judgment question—disputed or not as to the evidence.
4. By answer, the appellants' requested the trial court to compel appellee to prove that its exhibits—the documents sought to be enforced—intended and meant what appellee alleged that they meant. The trial court refused to lend its ear to this request.
5. The trial court accepted, *ex parte,* unilaterally the intent alleged by the appellee. Appellee never had to prove its case.

6. The trial court denied to the appellants any right to be heard before being condemned.
7. The trial court denied to the appellants the right to contest with the appellee on the issue joined for trial by the pleadings.
8. The trial court permitted the appellee to become both litigant and trial judge. The appellee determined the intent question.
9. The trial court surrendered to the appellee the judicial power conferred upon it by the sovereign that created the court and the judge thereof—the duty to decide the contract intent under Oklahoma law.
10. The trial court denied to the appellants a right to trial of facts constituting the basis of the federal right claimed by appellee by a brief—not by any pleadings.
11. The trial court assumed a jurisdictional power that it had that was never invoked by the appellee. It was a special statutory power from a different sovereign, the U.S. The federal statutes had no connection to the loan contracts, the subject matter of the trial court's general jurisdiction.
12. The trial court denied to appellants a trial of the subject matter of which it had jurisdiction in the due and ordinary course of proceeding.
13. The trial court denied to the appellants a right to jury trial.
14. The trial court had no authority to apply federal law to Rule 13, the Oklahoma summary judgment rule.
15. The unconstitutional null and void interlocutory finding/order and its poisoned fruit, the summary judgment, invaded the appellants' property rights.

The 'ordinary', 'general', 'subject matter jurisdiction' of the trial court never extended to or authorized the above described judicial procedure.

EXHIBIT "D", attached to the amended Petition in Error and Preliminary Statement.

1. The first reason is that the Rule itself gives my clients the right to decline.

2. The second reason is that if my clients and I consent, we have agreeably WAIVED our right, under the Oklahoma Constitution and the long history of Oklahoma to have appeal courts that do not 'fast track". In my opinion and judgment, the people of Oklahoma, when it was formed as a State and the Constitutional judicial system was adopted, the people never then intended to have a 'fast track' appeal court. In addition, I do not think that that ancient intent has ever changed.

3. The third reason is that I have tried it one time. And, never again for me.

Respectfully submitted,

/s/ R. M. Helton

R. M. Helton, appellants'
Counsel of record.

ITEM - 2

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

FILED
JUL 30 1990

MIKE BARNETT, et al, appellants,	)	
	)	
vs.	)	
	)	NO.
VICTOR S. & L. ASSN., appellee.	)	74513

MOTION TO RETAIN
(Rule 1.16(c)(a) & (c)

To the Honorable Chief Justice of said Court:

Appellants move the Supreme Court to retain jurisdiction and review this case for the following reasons:

First - Subsection "(a)"
(First Impression Questions)

1. Whether *briefs* of FSLIC/FDIC can invoke an Oklahoma District Court's concurrent federal law jurisdiction under 12 U.S.C. § 1725(C)(4) [as to FSLIC] and 12 U.S.C. § 1819 (4th) [as to FDIC] for a federal law claim and remedy subject matter, arising under the FSLIC Insurance Act of 1938, as amended, and the FDIC Insurance Act of 1950, as amended, including specially, 12 U.S.C. § 1823-(e), of the latter act? [The former act was repealed and the later act was last amended by the FIRRE Act (Of Congress) of August 9, 1989.] Included in the question are two U.S. Supreme Court cases: *D'Oench Duhme & Co. v. FDIC,* (1942), 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956; *Langley v. FDIC,* (1987), 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340.

2. Whether Rule 13 of the District Court Rules and especially sub-section "(e)" means and refers *only* to Oklahoma law when the *only* subject matter jurisdiction invoked in an Oklahoma District Court was its *general* common law jurisdiction, to-wit: Action to foreclose a real estate mortgage on Oklahoma land, and, debt default of the mortgage note and nine concurrently made so-called 'guaranty agreements', all of which were contemporanously closin (sic) Oklahoma at the office of a federally insured Thrift, and all were performable in Oklahoma?

3. Alternative statement of question number "2". Whether Rule 13 of the District Court Rules and especially sub-section "(e)" means and refers also to a federal law claim and remedy asserted in a *brief* of the FSLIC, receiver, concurrently filed in support of a Rule 13 motion for summary judgment, when, on the day of filing the motion and supporting brief, the then pending petition of FSLIC, receiver, had only invoked the district court's *general* common law subject matter jurisdiction? The motion for summary judgment, when filed, wa *not* a motion for summary judgment on any *pending* federal law claim and remedy.

Second - Sub-section "(c)"
(Constitutional claims)

1. Amendment VII, U.S. Constitution; Art. 2, § 19, Oklahoma Constitution. The right to jury trial has been denied to the appellants by the action of the trial court (TC) in granting appellee a summary judgment.

2. Amendment X, U.S. Constitution. Appellants' right to trial by an Oklahoma TC that would exercise all judicial power reserved to Oklahoma was denied to the appellants. The TC's refusal to determine the intent of the parties to the loan contract sought to be enforced by the appellee in the district court of Delaware County, invaded

that constitutional right. The appellee became both plaintiff and trial judge. It determined, *ex parte,* the contract intent.

3. Art. VI, U.S. Constitution. In making the interlocutory finding/order authorized by federal law and its operation, the summary judgment was contrary to Art. VI, in that the Supreme law of the land, Amendments V, VII & XIV were disregarded and not enforced by the TC.

4. Art. V & XIV, Bill of Rights, U.S. Constitution and Art. 2, § 7, Oklahoma Constitution. The judicial action of the TC in rendering the interlocutory finding/order of September 6, 1989, was an act of the TC that was *corum non judice* and void. Its resulting FRUIT, the summary judgment of September 6, 1989, was also *corum non judice* and void. The null and void TC acts denied to the appellants procedural and substantive due process of law, as follows:

a. The TC never determined the intention of the parties.
b. The TC never determined whether there was any material disputed questions of fact surrounding that intent.
c. The TC determined that federal law precluded it from deciding either question—that is, intent as a 'merit' question or intent as a summary judgment question—that is, disputed or not as to the evidence.
d. By answer, the appellants' requested the TC to compel appellee to prove that its exhibits—the documents sought to be enforced—intended and meant what appellee alleged that they meant. The TC refused to do so.
e. The TC accepted, *ex parte,* unilaterally the intent alleged by the appellee. Appellee never had to prove its case.
f. The TC denied to the appellants any right to be heard before being condemned.

g. The TC denied to the appellants the right to contest with the appellee on the issue joined for trial by the pleadings.
h. The TC permitted the appellee to become both litigant and trial judge. The appellee determined the intent question.
i. The TC surrendered to the appellee the judicial power conferred upon it by the sovereign that created the court and the judge thereof—the duty to decide the contract intent.
j. The TC denied to the appellants a right to trial of the facts constituting the basis of the federal right claimed by appellee by a brief—but by any pleading.
k. The TC assumed a jurisdictional power that it had that was never invoked by the appellee. It was a special statutory power from a different sovereign, the U.S. The federal statutes had no connection to the loan.
l. The TC denied to appellants a trial of the subject matter of which it had jurisdiction in the due and ordinary course of proceeding.
m. The TC denied to the appellants a right to jury trial.
n. The TC had no authority to apply federal law to Rule 13 the Oklahoma summary judgment rule.
o. The TC has permitted the appellee to invade their property rights unlawfully.

Respectfully submitted,

/s/ R. M. Helton

R.M. Helton, OBA # 4066,
Solo practitioner,
713 Lamar Street,
Wichita Falls, TX 76301,
Tel. # 817-723-0729,
Appellants' counsel.

CERTIFICATE OF SERVICE

I, R. M. Helton, counsel aforesaid, hereby certifies that on July 31, 1990, that he hand delivered a copy of the above and foregoing Motion to E. Mark Petrich, Esq., attorney for appellee, at his law office in Tulsa, Oklahoma, at 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma, 74172-0154.

/s/ R. M. Helton

R. M. Helton,
Counsel aforesaid.

ITEM # 3

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
AUG 15 1990

MIKE BARNETT, ET AL,.	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	NO.
VICTOR SAVINGS AND LOAN ASSOCIATION,	)	74513
	)	
	)	
Appellee.	)	

STIPULATION OF APPELLANTS AND APPELLEE

TO THE HONORABLE CHIEF JUSTICE OF SAID COURT:

The Appellants, through their counsel of record R. M. Helton, and the Appellee, through its counsel of record R. Mark Petrich, hereby stipulate as follows:

1. Pursuant to the enactment of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, Public Law 202-73, which was enacted on August 9, 1989, the Federal Savings and Loan Association ("FSLIC") was abolished and the Federal Deposit Insurance Corporation ("FDIC") became Manager of the FSLIC Resolution Fund and succeeded to all rights, titles and interest of the FSLIC as receiver for Victor Savings and Loan Association ("Victor").

2. The FDIC as receiver for Victor should, therefore, be substituted in this action as the Appellee in place of the FSLIC as receiver for Victor.

Dated this 9th day of August, 1990.

/s/ R. M. Helton

R. M. Helton
713 Lamar Street
Wichita Falls, Texas 76301

ATTORNEY FOR
APPELLANTS

/s/ R. Mark Petrich

R. Mark Petrich
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR APPELLEE

ITEM # 4

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA

Filed
SEP 16 1991

The following cases stand assigned to Court of Appeals, Division 4, Kenneth D. Bacon, Presiding Judge, John F. Reif, Judge, and Ronald J. Stubblefield, Judge:

74,513 FDIC, Receiver for Victor Savings and Loan Association, v. Mike Barnett, et al.

The proceedings to be conducted are henceforth to be governed by the Rules of Practice and Procedure in the Court of Appeals and on Certiorari to the Supreme Court, 12 O.S.1981, ch. 15, app. 3.

Until the Court of Appeals, Division 4, has made its final disposition of an asigned case, all motions, petitions for rehearing, as well as other paperwork, must be filed with the Clerk of the Supreme Court who serves *ex officio* as the Clerk of the Court of Appeals, Room 1, State Capitol, Oklahoma City, Oklahoma.

DONE BY THE COURT OF APPEALS THIS 12th day of September, 1991.

/s/ JOHN F. REIF

JOHN F. REIF
Acting Vice Chief Judge

A-128

ITEM # 5

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Filed
NOV 26 1990

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

74,513 Federal Deposit Insurance Corporation Receiver for Victor Savings & Loan Association v. Mike Barnett, John R. Helton et al. Appellants' motion to retain denied.

ITEM # 6

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

FILED
JUL 30 1990

MIKE BARNETT, ET AL, appellants,	)	
	)	
vs.	)	
	)	NO.
FDIC, Receiver for Victor Savings and Loan Association, appellee.	)	74,513

MORTGAGE FORECLOSURE AND DEBT SUIT

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA, HONORABLE SAM C. FULLERTON TRIAL JUDGE No. C-85-371

ORIGINAL BRIEF OF THE APPELLANTS

ROBERT M. HELTON,
OB No. 4066
713 Lamar Street
Wichita Falls, Texas 76301
Tel. No. 1-817-723-0729
Counsel for Appellants.

SUBJECT INDEX

Abstract of the record-Part 1 1
Part 2 6

Specification of errors v

1. The trial court erred in granting the appellee a summary judgment of September 6, 1989, R. pg. 229

2. The trial court erred in overruling appellants' motion to reconsider on November 8, 1989, R. pg 225

3. These trial court errors invaded appellants' state and federal due process rights under Amendments Numbered V and XIV, U.S. Constitution and Art. 2, § 7, Oklahoma Constitution . . . . . .

4. These trial court errors invaded appellants' rights under Art. VI, Amendments VII, and X, U.S. Constitution and Art. 2, § 19, Oklahoma Constitution.

Threshold Question v

Whether or not the interlocutory finding/order of the trial court, made September 6, 1989, was jurisdictionally null and void: . . . . . .

1. because the trial court was never authorized by federal law to limit the scope of Oklahoma law's object to be achieved by Rule 13 and trial court's mandatory duty under the rule to detemine whether there was any genuine, material disputed facts on issues essential to appellee's right to a summary judgment under Oklahoma law.

Ultimate Question v

Whether or not the summary judgment granted in this case on September 6, 1989, was the poisoned fruit of a state and federal unconstitutionally null and void interlocutory finding/order of the trial court, made on September 6, 1989, that precluded the appellants from the use of all of their state law cliams? .....

Contentions, Argument and Authorities-Part 1

The subject matter jurisdiction laws stated in *Osage Oil & Refining Co. v. Interstate Pipeline Co.* (1927) 124 Okl. 7, 253 P.66, apply and control this case 7

Contentions, Argument and Authorities-Part 2

The procedural jurisdiction laws stated in *Howard v. Duncan,* (1933), 163 Okl. 142, 21 P.2d 489, apply and control this case 9

Reeves v. Agee, Okl., 769 P.2d 745 11

Other cited jurisdiction laws apply and control this case 11

State v. Whitehead, (1955) 151 Me. 135, 116 A.2d 618 11

City of New Orleans v. Di Benedetto, La. App. (1962), 144 So.2d 558 11

Riseley v. Phoenix Bank of City of New York (1880), 83 N.Y. 318, 38 Am. Rep. 421 15

Bowles, Admr. v. The Barde Steele Co., (1945), ____Or.____,164 P.2d 692, 162 A.L.R. 328 12,14,16

Pan American Petr. Corp. v. Superior Court of Del., (1961) 366 U.S. 656, 81 S. Ct. 1303, 6L.Ed.2d 584 13,16

12 U.S.C. §§ 1725(C)(4)and 1819(4th) 12

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Quotations from Freeman on Judgments, 5th Ed. Vol. 1, § 337, pgs. 675, 677, citing *Lewis v. Gillard*, (1918) 70 Okl. 231, 173 P. 1136 16

Quotation from the *Lewis* case 16

Quotation from Freeman Judgment, 5th Ed. Vol. 1, § 338, pg. 678 17

Reynolds v. Stockton, (1887) 43 N.J. Eq. 211, 3 Am. St. Rep. 305, 10 Atl. 385, with quotation 17,18

Seamster v. Blackstock, (1887) 83 Virginia 232, 5 Am. St. Rep. 262, with quotation 18,19

Continuation of quotation from Freeman on Judgments, 5th Ed. Vol. 1, § 338, pg. 678 20

Id §338, pg. 679 20

Id §338, pg. 680 20

Id §355, pg. 737 20

Id §355, pg. 738 21

Id §355, pg. 738 21

Contentions, Argument and Authorities-Part 3(A)

Under Oklahoma law, there was genuine material, and relavant disputed evidence on an issue essential to appellee's right to summary judgment. 22

Tigert v. Admiral Corp., (1979) Okl. App. 612 P.2d 1381 22

Williston on Contracts, Rev. Ed. 1938, § 863, pg. 745 24

Tigert v. Admiral Corp., supra 25

Bowles, Admr. v. Barde Steele Co., supra, pgs. 342-346 of 162 A.L.R. 26,27

Contentions, Argument and Authorities-Part 3(B)

The TC had no authority to alter Rule 13 by applying federal law to it. Mandatorily, the TC had to use Oklahoma law in applying Rule 13 27

Contentions, Argument and Authroities-Part 4

The constitutional claims of the Appellants.

Claims under Amendment VII, U.S. Constitution and Art. 2, § 19. Oklahoma Constitution, Jury trial denied 28

Claims under Amendment X, U.S. Constitution. Appellants' right to trial by an Oklahoma TC that would exercise all judicial power reserved to Oklahoma was denied to the appellants 28

Claims under Art. VI U.S. Constitution. In making the interlocutory finding/order, the summary judgment was contrary to Art. VI, in that the supreme law of the land, Amendments V, VII & XIV were disregarded and not enforced by the TC 28

Claims under Arts. V and XIV, Bill of rights, U.S. Constitution and Art. 2, § 7, Oklahoma Constitution. The interlocutory finding/order and the fruit thereof, the summary judgment, were devoid of due process of law 28,29

Scott v. McNeal, (1904), 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896 29

Contentions, Argument and Authorities-Part 5

Appellants' closing argument 30

1. The TC had no jurisdiction to render the interlocutory finding/order or the summary judgment 30

   The TC's order refusing to reconsider quoted from a sentence in appellee's brief 30

   Element number 3 of Freeman's 3 elements is missing 31

2. The TC had no authority to apply federal law to Rule 13. It was the TC's mandatory duty to use Oklahoma law in applying Rule 13 . . 31,32

Bowles, Admr. case, supra, quoted pg. 352 of 162 A.L.R. 31

Id., supra, quoted pg. 342 of 162 A.L.R. 32

Relief requested 32

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ITEM # 7

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

FILED
OCT 15 1990

MIKE BARNETT, ET AL, appellants,	)	
	)	
vs.	)	
	)	NO.
FDIC, Receiver for Victor Savings and Loan Association, appellee.	)	74,513

MORTGAGE FORECLOSURE AND DEBT SUIT

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA, HONORABLE SAM C. FULLERTON TRIAL JUDGE No. C-85-371

REPLY BRIEF OF THE APPELLANTS

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Counsel for Appellants.

SUBJECT INDEX

Page

I.

THE FIRST SENTENCE, QUOTED HEREAFTER, OF PART II-A, OF APPELLEE'S ANSWER BRIEF, PG. 5, UNDERSCORES ITS FLAWED CONTENTIONS ARGUMENT AND AUTHORITIES 1

"Appellants, in a convoluted and unclear manner, argue in the brief-in-chief that the Trial Court did not have subject matter jurisdiction over the action to apply the doctrine established in *D'Oench, Duhme & Co. v. FDIC****to reject the defenses* asserted by the Appellants." *(Emphasis added.)* 1

In the quoted sentence, appellee has mislabeled and has misconceived, and thus misdescribed as '*defenses*' of appellants, matter that was appellee's jurisdictionally affirmative burden 1

Riverside Park Realty Co. vs. FDIC, 1987, M.D. Tenn. 465 F. Supp. 305, 321 *et seq.* 2

That major flaw is the contention, claim and assertion that the question of contract intent was a 'defense'. Appellee could not 'bootstrap' appellants' right to require appellee to prove its alleged claim into a 'defense' posture 2

II.

THERE IS GENERATED THE FOLLOWING QUESTION OF LAW FROM THE DIVERSE VIEWS OF APPELLANTS AND APPELLEE.

IN AN OKLAHOMA COMMON LAW COURT WITH GENERAL COMMON LAW JURISDICTION, IN AN OKLAHOMA COMMON LAW CONTRACT CLAIM CASE, DOES THE PLAINTIFF HAVE THE BURDEN TO PLEAD, AS AN ESSENTIAL ELEMENT OF THE CLAIM, THE INTENT OF THE PARTIES TO A WRITTEN CONTRACT AND TO PROVE THAT THE WRITTEN CONTRACT SUPPORTS THE INTENT ALLEGED? 3

It is an old and familiar "Hornbook" contract common law that the answer to this question is a very firm 'yes' 3

III.

IT IS UNDISPUTED AND PROVED IN THIS COURT THAT THERE WERE TWO KINDS OF RELIEF GRANTED BY THE TRIAL COURT:
(1) OKLAHOMA COMMON LAW CONTRACT RELIEF AND
(2) SPECIAL LIMITED STATUTORY RELIEF 3

Among others, one of the appellants' COMPLAINT in this Court is about relief in case class '(2)' above 4

Osage Oil & Refining Co. vs. Interstate Pipeline Co., 1927, 124 Okl. 7, 253 P. 66 4

IV.

PLEADING LAW IS NOT THE SOURCE OF JURISPRUDENCE OF JURISDICTION. THE JURISPRUDENCE OF JURISDICTION PROVIDES WHAT MUST BE PLED IN STATUTORY CLAIMS. 5

Federal Rule 8 equals 12 OSA § 2008 5

Davis v. Passman, 442 U.S. 228 (1979) 5

Original Ballet Russe v. Ballet Theatre, 133 F.2d 187, 189 5

Footnote 15 in *Davis v. Passman* 6

U.S. v. Employing Plasterers Ass'n, 347 U.S. 186 ... 6

12 OSA § 559, held unconstitutional in *Puckett v. Cook*, 1978, Okl. 586 P.2d 721 6

Marberry v. Madison, US Supreme Court, (citation not required—well known case.) 6

Rule 3, (Dist. Ct. Rules) 7

Riverside Bank Realty Co. vs. FDIC, supra 7

V.

SIX MATTERS, STATED IN THIS PART, ARE FACTS THAT APPELLEE KNEW OR SHOULD HAVE KNOWN.

KNOWING THESE SIX MATTERS, 12 OSA § 2011 COMMANDED APPELLEE TO ADVISE THE TRIAL COURT AND THIS COURT, IN WRITING, THAT IT CONTENDED THAT KNOWN PRIOR LAW SHOULD EITHER BE OVERRULED OR DISTINGUISHED.

APPELLEE HAS FAILED IN THIS DUTY. IN SO FAILING IN THIS DUTY, THE ENTIRE POSITION OF APPELLEE IN THIS COURT IS BOTH UNTENABLE AND FRIVOLOUS 8

1. The jurisdictional facts of § 1823(e) and the *D'Oench* case doctrine 8

2. The Okla. contract common law claim of the petition relied solely upon the loan asset papers and not upon any collateral matter 8
3. MR. JUSTICE JACKSON'S admonition statement in his *D'Oench* case opinion 8
4. Chief Dist. Judge MORTON'S statement in *Riverside Park Realty Co. v. FDIC* 8
5. There must be a 'justiciable matter' in appellee's federal law claim. Art. 7 § 7, Oklahoma Constitution 8
6. That appellee had no standing to sue from numerous decisions of this Court, including *Southwestern Bell Tel. Co. v. Brown*, Okl. 1974, 519 P.2d 491, 495 *et seq.*, and effect of 'knowledge'. THIS CASE WAS CITED BY APPELLEE IN ITS REPLY BRIEF, PAGE 6, SO IT KNEW ABOUT THE CASE 8

The assertion and contention of appellee in briefs, both in the Trial Court and this Court, that the intent question, issue, or matter, was a '*defense*', in light of appellee's knowledge, actual or constructive, was untenable, and was frivolous 9

VI.

THE APPELLEE LACKED STANDING TO CLAIM THE USE OF 12 USC § 1823(e) AND THE *D'OENCH* CASE DOCTRINE, ("TWO FEDERAL LAWS") 10

THE APPELLEE'S CLAIM BASED UPON THESE TWO FEDERAL LAWS FAILED TO PRESENT A JUSTICIABLE MATTER TO THE TRIAL COURT 10

THE TRIAL COURT LACKED JURISDICTION TO GRANT APPELLEE ANY RELIEF AUTHORIZED BY THESE TWO FEDERAL CLAIMS 10

ALL RELIEF THE TRIAL COURT GRANTED TO APPELLEE UNDER THESE TWO FEDERAL LAWS WAS *CORUM NON JUDICE* AND NULL AND VOID 10

Two major complaints are stated in paragraph one of page 11 11

No law limits the time and place of raising 'standing to sue', *Matter of Estate of Doan*, Okl. 1986, 727 P.2d 574, 576 11

In 'standing to sue' questions, there must be a petition to construe, *Independent School Dist. No. 9 v. Glass*, Okl. 1982, 639 P.2d 1233, 1237. THERE WAS NO PETITION IN THIS CASE FOR THE TRIAL COURT TO CONSTRUE 11

Jurisdiction in INVOKED by a pleading, usually a petition. *Howard v. Duncan*, 1933, 163 Okl. 142, 145 21 P.2d 489 11

Title 12 OSA § 2008 provides for the use of a 'petition', not briefs 12

Cited and quoted is § 338, page 628, Freeman of Judgments, 5th Edition. Substance of the quote: In a pending case with jurisdiction, if one desires other different relief, one must ask for it by petition. Failure to do so is fatal to the relief secured but never sought 12

Freeman, § 338 is cited in *Fitzsimmons v. Oklahoma City*, 1942, 192 Okl. 248, 250, 135 P.2d 340, 343. Fitzsimmons contains a list of Oklahoma cases where there is, in the same judgment, valid and void parts 12

Although the Trial Court had jurisdiction of a statutory case class, its telephone failed to ring for lack of a pleading. The trial court could NOT answer a telephone that never did ring 12

Subject matter jurisdiction can never be conferred by waiver or consent. *Osage Oil & Refining, supra* 12

It is a general rule that when a court of general jurisdiction proceeds under a special statute, it is a court of limited jurisdiction for the purpose of that proceeding, and its jurisdiction must affirmatively appear. *Id., supra* 12

A federal statutory law claim, under the rule of *Glass* and *Osage* had to be pled in order to invoke the Trial Court's jurisdiction 12

For lack of any pleading—especially a petition—the appellee had no standing to sue—a subject matter jurisdictional defect. All relief granted by the Trial Court under § 1823(e) and the *D'Oench* case doctrine was *corum non judice* and null and void and unconstitutional under the 'due process' clauses of both the US and Oklahoma Constitutions. *Scott v. McNeal*, 1904, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896. The summary judgment operates upon appellants' property rights 12

In the *Glass* case, *supra*, this Court addressed standing to sue on issues arising from statutes. If the statute is NOT APPLICABLE, there is no standing 12

Section 1823(e) and *D'Oench* case doctrine are NOT applicable 12,13

Where is the harm? Where are the 'side agreements' that would mislead the examiner? The *Langley* case says harm comes from those 'unknown' 'collateral' 'side agreements' that the first examiner would never know about. Where are they? The INTENT QUESTION arises from the loan asset papers. They were for the examiner to see 14

Riverside Park Realty Co. v. FDIC, supra. Langley v. FDIC, 1988, 484 U.S. 86, 108 S.Ct. 60, 74 L.Ed.2d 63, *D'Oench* case doctrine, § 1823(e) 14

Whether the briefed federal non-common law claim stated justiciable matter need not be decided, since briefs do not create standing to sue 14

The above makes it unnecessary to decide any of appellee's briefed claims in support of jurisdiction for the federal non-common law relief granted 15

VII.

THE FEDERAL DEPOSIT INSURANCE ACT OF 1950, AS AMENDED BY § 1823(e) AND THE *D'OENCH* CASE AND ITS PROGENY HAVE NO APPLICATION TO THIS CASE 15

THESE FEDERAL LAWS HAVE NOT PRE-EMPTED APPLICABLE OKLAHOMA LAW 15

ALL RELIEF GRANTED APPELLEE AGAINST APPELLANTS BY THE TRIAL COURT, WAS NULL AND VOID FOR LACK OF SUBJECT MATTER JURISDICTION 15

ALL RELIEF DENIED TO APPELLANTS UNDER OKLAHOMA LAW WAS A BREACH OF A MANDATORY DUTY OF THE TRIAL COURT 15

THE *IN REM* FORECLOSURE RELIEF GRANTED BY THE TRIAL COURT WAS JURISDICTIONALLY VALID 15

THE VALID AND VOID RELIEF WAS SUFFICIENTLY SEPARABLE. THE VOID RELIEF DOES NOT RENDER THE VALID RELIEF VOID 15

If the policy of the FDIC Deposit Insurance Act of 1950, of which § 1823(e) is a part, and which is the basis of the *D'Oench* case and its progeny, was a policy that was intended by Congress to render indisputable all matter arising directly from loan asset papers, such policy would render the loan asset papers unenforceable for lack of 'mutuality of contract' 14,15

Ash v. Chas F. Noble Oil & Gas Co., 1925, 96 Okl. 211, 214, 223 P. 175; *Wood & Co. v. Van Deursen*, 1926, 122 Okl. 19, 20, 250 P. 524, WORDS & PHRASES, 1961, Vol. 27A, pg. 735, *Fiedler, Inc. v. Coast Finance Co.*, 129 N.J. Eq. 161, 18 A.2d 268, 135 ALR 273, 277 16

There can be partial pre-emption. Pre-emption requires an explicit conflict between Oklahoma and federal law 16

Savage v. Jones, 1911, 225 U.S. 501, 533, 32 S.Ct. 715, 725, 51 L.Ed. 1182; *Skiriotes v. Floriday*, 1941, 313 U.S. 69, 61 S.Ct. 924, 928, 85 L.Ed. 1193 16

The policies of the FDIC Insurance Act, of which § 1823(e) is a part, and the gist of the *D'Oench* case and its progeny do not remotely purport to 'explicitly conflict' with the burden of proof law of Oklahoma or Oklahoma's doctrine of 'mutuality of contract' and the right of contracting parties to dispute the intent found in their written contracts 16

These federal laws DO PRE-EMPT Oklahoma law that provides that the intended affirmative 'side agreements' or collateral 'inequitable matter' were 'defenses' that would harm the deposit insurance fund by diminishing or defeating the right of FDIC 16

The bench case intent dispute arises directly from and out of the loan asset papers. They are not 'side agreements'. They are not 'collateral inequitable conduct' 17

Riverside Park Realty Co. vs. FDIC, supra 17

Section 13(e), Rules of the Dist. Courts, has been by the trial court violated. The sub-section means and refers to Oklahoma law—not federal 17

Since these federal laws have no factual application to this case, even if a petition had existed, there would have been no standing to sue and no justiciable matter presented thereby 17

La Bellman v. Gleason & Sanders, Inc., Okl. 1966, 418 P.2d 949, 953 and 956, has application to this case 17,18

See also, *Central National Oil Co. v. Continental Supply Co.*, 1926, 119 Okl. 198, 193, 249 P.347 18
Standard Sav. & Loan vs. Anthony Wholesale Gro. Co., 1916, 62 Okl. 242, 244, 162 P. 451, LRA 1917D 1029; *Fitzsimmons vs. Oklahoma City*, 1942 192 Okl. 248, 250, 135 P.2d 340, 343 19

VIII.

APPELLEE HAD NO STANDING TO INVOKCE RULE 13 BY THE USE OF BRIEFS SUPPORTED BY FEDERAL LAW. SUB SECTION "(e)" RESTRICTED BY THE TRIAL COURT'S AUTHORITY TO OKLAHOMA LAW. THE

TRIAL COURT'S THEN EXISTING JURISDICTION WAS LIMITED TO AN OKLAHOMA LAW COMMON LAW CONTRACT CLAIM 19

FOR LACK OF SUCH STANDING, THE TRIAL COURT NEVER ACQUIRED ANY SUMMARY JUDGMENT POWER AND AUTHORITY TO SUMMARILY PROCEED TO JUDGMENT AGAINST THE APPELLANTS. IT LACKED JURISDICTION OF ANY FEDERAL LAW SUBJECT MATTER.....19

IN ADDITION, AS TO THE APPELLANTS, THE MOTION AND BRIEFS NEVER PRESENTED TO THE TRIAL COURT A JUSTICIABLE MATTER. THE FEDERAL LAWS IN QUESTION HAD NO APPLICATION TO THE OKLAHOMA COMMON LAW CONTRACT SUBJECT MATTER THAN BEFORE THE TRIAL COURT. THE MOTION AND BRIEFS MERELY PRESENTED ABSTRACT AND HYPOTHETICAL QUESTIONS 19

D'Oench case and its progeny. *Riverside Park Realty Co. v. FDIC, supra.* The authorities cited in Part Vi, *supra* 19

IX.

SUMMARY AND CLOSING STATEMENT 19-23

(The required conclusions are stated on pages 22-23)

X.

RELIEF REQUESTED 23

CERTTIFICATE OF SERVICE 23

A-146

ITEM # 8

IN THE COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

FILED
DEC 3 1991

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Appellee,	)	
vs.	)	No. 74,513
MIKE BARNETT, JOHN R. HELTON, JEFF L. HIRZEL, JAMES W. LITTLE, KENNETH E. MILLER, PHILLIP E. SNODDY, MARVIN L. WYNN, each individually and as a Partner of SOONER VISTA, a partnership,	)	NOT FOR PUBLICATION
Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA

Honorable Sam C. Fullerton, Trial Judge

R. Mark Petrich
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
Tulsa, Oklahoma — For Appellee

Robert M. Helton
Wichita Falls, Texas — For Appellants

Jeff L. Hirzel
Guthrie, Oklahoma — Pro Se

MEMORANDUM OPINION

REIF, J.

This appeal concerns the liability of certain general partners on two notes and a mortgage of the Sooner Vista partnership. There was no dispute that the notes were in default and that the receiver for the federally insured lender-mortgagee was entitled to foreclose on the property securing the notes. The trial court granted summary judgment on the notes and mortgage and held that all the general partners named as defendants were jointly and severally liable for any deficiency following foreclosure. General partners, Barnett, Helton, Hirzel, Little, Miller, Snoddy and Wynn, asked the trial court to reconsider the question of their joint and several liability. The trial court overruled their motion to reconsider from which they bring this appeal.

In the trial court, these general partners contested their joint and several liability on alternative grounds. First, they contended that they were released from liability on the original partnership note when the lender-mortgagee accepted a second note with a higher interest rate *after* their withdrawal from the partnership. They asserted the this second note constituted a novation between the remaining partners and the lender-mortgagee. They also asserted that the lender-mortgagee was estopped from seeking recovery from them because it accepted the second higher interest note knowing that they were no longer part-

ners. Lastly, they urged that any individual liability that each may have for a deficiency would be on a pro rata basis rather than joint and several. They based this on a provision in their guaranty agreements limiting their guarantor liability to ten percent of the partnership debt.

All of the foregoing defenses were raised in the contesting partners' original answer, and were reasserted in their answer to the amended petition *except* the ten percent pro rata liability defenses. In responding to the motion for summary judgment, the *only* factual controversy that they specifically raised was "whether Note 1 [the original partnership note] has been extinguished by the giving of Note 2 [the second higher interest rate note] which precludes the entry of summary judgment." The contesting partners *did not file any affidavits or other evidentiary materials* to demonstrate a controversy on this single issue that they raised. Their motion to reconsider and supporting brief properly sought review of the novation issue raised on summary judgment, but *added* the issue of pro rata liability that had been omitted from their amended answer and their response to the motion for summary judgment. The only evidentiary material submitted in support of the motion to reconsider concerned the question of pro rata liability. A supplement to their motion to reconsider raised yet *another* issue that was omitted from their response to the summary judgment; that is, the release of another general partner operated to release them as well. They offered evidentiary material to support this *new* issue, but *nothing to support the single issue of novation raised in their response* to the motion for summary judgment.

The original petition in error of the contesting partners did *not* assign error or raise any issue concerning their defense of novation, but instead propounded various errors concerning the issue of pro rata liability. The amended peti-

tion in error added several contentions that the summary judgment violated the contesting partners' constitutional rights but also failed to specifically raise any question concerning the single issue of novation raised in the motion for summary judgment.

The state of the record in this case makes it unnecessary to address the issues briefed by the contesting partners, because none of the issues raised and briefed on appeal were properly preserved or presented for review and disposition. The single issue of novation raised in the response to the motion for summary judgment was not raised on appeal, while the question of pro rata liability presented on appeal was not raised in the motion for summary judgment before the trial court.[1] Even if we held that the issue of novation was encompassed in the *general* appellate propositions that a controversy existed about the parties' intent, any question of the parties' intent was to be determined by the trial court as a matter of law from the

---

[1] The burdens on summary judgment as well as the consequences for failing to meet those burdens are clearly delineated by District Court Rule 13, 12 O.S. Supp. 1990, ch. 2, app. First, under 13(b) a party opposing a summary judgment "shall serve on the moving party and file with the court clerk . . . a concise written statement of the material facts as to which . . . a genuine issue exists and the reasons for denying the motion." This provision also requires the adverse party to file admissible evidentiary materials to support the denial and prohibits the adverse party from relying on the allegations or denials in his pleading alone. The response "shall set forth and number each specific material fact which is claimed to be in controversy" with reference to the evidentiary materials to support the dispute on that issue. All material facts set forth by the moving party which are supported by admissible evidence "shall be deemed admitted for the purpose of summary judgment unless specifically controverted." The concluding provision of 13(b) addresses the consequences of a deficient summary judgment response on appeal: "If the motion for judgment is granted, the party or parties opposing the motion cannot on appeal rely on any fact or material that is not referred to or included in the [response] in order to show that a substantial controversy exists."

parties' written instruments alone. *See Mercury Investment Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 (Okla. 1985). In view of the foregoing, we are constrained to affirm the trial court.

AFFIRMED.

BACON, V.C.J., and STUBBLEFIELD, J., concur.

December 3, 1991

A-151

ITEM # 9

IN THE COURT OF APPEALS
DIVISION - 4
STATE OF OKLAHOMA

FILED
DEC 23, 1991

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver,	)	
Appellee,	)	
vs.	)	No. 74,513
MIKE BARNETT, ET AL.,	)	
Appellants.	)	

PETITION FOR REHEARING

APPEAL FROM THE DISTRICT COURT
OF DELAWARE COUNTY, OKLAHOMA, CASE NO.
C-85-371
HONORABLE SAM C. FULLERTON TRIAL JUDGE

MORTGAGE FORECLOSURE
AND SUIT ON NOTES
AND GUARANTIES

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Solo practitioner,
713 Lamar Street,
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Tel - 817-723-0729 & 817-766-2828

Attorney for appellants.

IN THE COURT OF APPEALS
DIVISION 4

STATE OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for VICTOR SAVINGS AND LOAN ASSOCIATION,	)	
Appellee,	)	
vs.	)	No. 74,513
MIKE BARNETT, JOHN R. HELTON, JEFF L. HIRZEL, JAMES W. LITTLE, KENNETH E. MILLER, PHILLIP E. SNODDY, MARVIN L. WYNN, each individually and as a Partner of SOONER VISTA, a partnership,	)	
Appellants.	)	

TO THE HONORABLE COURT OF APPEALS, DIVISION 4:

PETITION FOR REHEARING
(Rule 3.9)

The appellants, named in the caption hereof, move the Court to rehear this case and upon a consideration of the errors herein set forth withdraw its affirmance order and memorandum opinion, and thereafter review and consider the specified alleged errors assigned in the amended petition in error and brief of appellants in support thereof and thereupon render such order as is just and right, supported by a proper written opinion.

Specification of Errors

Error No. 1 (Not requested)

Error No. 2 (Not requested)

Error No. 3 (Not requested)

Error No. 4 (Not requested)

Error No. 5 (Not requested)

Error No. 6 (Not requested)

Error No. 7

The Appellant's Claim of Reviewable Fundamental *Corum Non Judice* Action of the Trial Court.

Encompassed in this claimed error and as a result of this Court's refusal to correct the trial Court's error, this Court will be guilty of approving the trial Court's denial of 14th Amendment due process of law owed by Oklahoma to the appellants by the 14th Amendment.

Oklahoma will be as guilty of depriving appellants due process of law as was the State of Washington in the case of *Scott v. McNeal*, decided in 1904, reported in 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896.

Oklahoma's District Court system is a state wide Oklahoma instrumentality of its government of which the District Court of Delaware County is a unit. When the District Court of Delaware County acts, Oklahoma, as a state, acts. The 14th Amendment is a U.S. Constitutional command to Oklahoma. The com-

> mand is: Oklahoma, you shall not deny to a U.S. Citizen or an inhabitant within its jurisdiction, due process of law, as applied by the U.S. Supreme Court. That Court, in *Scott v. McNeal*, said that state court judgments which affect property, which are *corum non judice*, are void and denies to that property owner 14th Amendment due process of law.

It matters not that this error was not claimed to be a reviewable question or issues in appellants' amended petition in error. [1] This claimed error involves the lack of subject matter judicial power and jurisdiction of the trial Court. It is of an error quality that cannot be waived. It is about a subject that cannot be consented to. This is the reason for the rule. This is why it is error so fundamental that review of it can be demanded at any stage of this case in any court to which the case is taken by appeal.

The only constraint upon reviewability by this Court does not exist. This Court has before it a certified record of the trial court's proceedings which contains all of the material and relevant parts of the trial court's 'judgment roll'. Therefrom, the trial court's *corum non judice* action can be examined by this Court.

As the certified record of this case reflects, no fact trial was conducted. Only a summary judgment trial took place. No stenographic record of the oral argument before Judge FULLERTON was made of the hearing of September 6, 1989. In the record is a stenographic transcription of the oral argument before Judge FULLERTON on November 1, 1989, when the appellants' motion to

---

[1] Appellants believe Exhibit 'C', Petition in Error, §§ 3 and 4, are sufficient to include a *corum non judice* claim of error. If not, in the alternative, we show that a *corum non judice* judgment error is reviewable as fundamental even though not specified as such in the Petiton in Error.

reconsider was heard. On November 8, 1989, Judge FULLERTON filed his personally drafted order refusing to reconsider.

A construction of the order affirming and the opinion this Court reflects that it precludes appellants of a review in this Court of fundamental *corum non judice* action of the trial Court. Unless reviewed here and corrected by granting appellants a rehearing, the fundamental *corum non judice* action of the trial Court will become an error of this Court, pointed out to this Court, yet uncorrected. This Court's refusal to review such fundamental error, after notice thereof, will be a continuation of the same error of the trial Court.

Encompassed in this claimed error and as a result of this Court's refusal to correct the trial court's error, this Court will be guilty of approving the trial Court's error, this Court will be guilty of approving the trial Court's denial of 14th Amendment due process of law owed by Oklahoma under the 14th Amendment to the appellants.

Error No. 8

This Court has committed error in ordering the case 'affirmed'. Its order should be 'Dismissed, No Jurisdiction'. The Court found and concluded that appellants presented a trial Court certified record that presented no reviewable trial Court points of error. One subject matter of this Court's jurisdiction is a trial Court certified record containing reviewable error. An order, 'case affirmed', would support a *res judicata* plea to an action in another Court attacking as void, the trial Court's summary judgment. An order, 'Dismissed, No Jurisdiction' would not support a *res judicata* plea to another action in another court.

This completes the Petition For Rehearing.

Relief Requested

The relief requested is stated in the opening paragraph on page 1.

Respectfully submitted

/s/ R. M. Helton

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Attorney for appellants.

ITEM # 10

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

FILED
FEB 18 1992

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

74,513 FEDERAL DEPOSIT INSURANCE CORPORATION, et al., Appellee, v. MIKE BARNETT, et al., Appellants.

Appellants' Petition for Rehearing is denied.

Done in conference this 14th day of February, 1992.

/s/ Kenneth D. Bacon

KENNETH D. BACON
Chief Judge
Court of Appeals

A-158

ITEM # 11

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
3-12-92

MIKE BARNETT, ET AL.,	)	
	)	
APPELLANTS,	)	
	)	
vs.	)	NO. 74,513
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver,	)	
	)	
APPELLEE.	)	

PETITION FOR CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF SAID COURT:

The seven appellants in this case are pleased to hereby present their Petition For Certiorari to the Court of Appeals, Division 4, agreeable to Rule 3.14, and hereby request appellate review by this Court of the decision and Opinion of said appeals Court.

1. The opinion of the Honorable Court of Appeals was not published. A copy thereof is appended to each copy of this petition.

2. December 3, 1992, is the date of the opinion below. February 18, 1992, is the date of the Order Refusing to Rehear.

3. The exercise of this Court's power of supervision is requested.

Part 1.

THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

1. The most important departure of the Court of Appeals has been its failure to recognize that constitutional fundamental error had occurred in the trial court, and *its refusal to review* the trial Court's summary judgment. Whether or not the certified transcript of the record proper reflected constitutional fundamental error is immaterial. It can be raised for the first time at any stage of appellate review. It cannot be waived or consented to. The alleged error is limited to the appellants.

2. The Court of Appeals is the first Court that appellants have had an opportunity to present their constitutional claims to.

3. Art. VI, § 2, U.S. Constitution commanded that this Court of Appeals review the constitutional fundamental error presented to it by the appellants. The Court of Appeal's decision to refuse to review this case since it involved 14th Amendment due process constitues *extreme* departure from the Court's accepted and usual course of judicial proceedings. Refusal to review by the Oklahoma Supreme Court will cast Oklahoma into the same position that the State of Washington found itself in *Scott v. McNeal*, 1904, 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896.

Part 2.

THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE TRIAL COURT.

1. A great coequal important departure of the Court of Appeals is the result of its refusal to review the trial Court's summary judgment. As a result of its refusal to review the trial Court's summary judgment, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceeding by the trial Court. The trial Court had committed constitutional fundamental error in its rendition of a final summary judgment against the appellants. The trial court was required to render a judgment that appellee 'take nothing' against appellants. In error, jurisdictional in nature, it rendered a bifrocated money judgment against each appellant because it applied *nonapplicable federal law, when it should have applied applicable Oklahoma law.* One result of its misapplication of law was, that appellee was never required by the trial court to prove that its *probata* supported its *allegata*, with respect to appellants' liability. Appellee, under Oklahoma law, had the *onus probandi* to prove that its *exhibited* commercial papers generated the specific money liability that appellee alleged that they generated. The trial Court *held* that the D'Oench-Duhme Docrine of the U.S. Supreme Court and Title 12 U.S.C.A. § 1383(e), precluded and estopped the appellants from all right, under Oklahoma law, to have the trial Court require that appellee comply with its onus probandi and prove that its *probata* supported its allegata with respect to appellants' liability. This decision was an ultra vires act of the trial Court and therefor was an act of the trial Court that was *corum non judice* and void.

This void decision produced the final summary judgment. It was the fruit of the void decision. Thus, the final summary judgment was also void, as against the appellants. Under Rule 13(e) [RDCO] the only final summary judgment that the trial court was authorized to make was a 'take nothing' judgment against the appellee. The probata of appellee wholly and totally failed to sustain appellee's allegata of the appellants' liability. It has not yet ended!! The trial Court's final summary judgment operated to effect the property rights of each appellant. The due process clause of the 14th Amendment, U.S. Constitution, commands Oklahoma and its Courts, as judicial agencies of the State, to *NOT* render judgments that affect the property rights of the judgment defendant that are void for lack of jurisdiction. *Scott v. McNeal, supra,* has so held. Oklahoma's Constitution is to the same effect. Thus, the trial court's void summary judgment against the appellants is error of a very serious constitutional nature.

This Court's discretion to review this case is mandated by Art. VI. of the U.S. Constitution. This Court, as it was of the Court of Appeals, has the U.S. Constitutional duty to preserve and protect the U.S. Constitution from all intruders—even the trial Courts of Oklahoma.

QUESTIONS PRESENTED

1

DOES THE CERTIFIED TRANSCRIPT OF THE RECORD PROPER REFLECT THAT IT CONTAINS A QUESTION OF THE TRAIL COURT'S LACK OF JURISDICTION TO RENDER A SUMMARY JUDGMENT AGAINST APPELLANTS?

2

IF SO, WAS NOT HTE JUDGMENT AND OPINION OF THE COURT OF APPEALS MANIFESTLY WRONG?

3

WAS THE D'OENCH-DUHME DOCTRINE OF THE U.S. SUPREME COURT AND TITLE 12 U.S.C.A. § 1382(e), LAW THAT WAS INAPPLICABLE TO THIS CASE?

4

IF SO, DID THE TRIAL COURT LACK JURISDICTION TO RENDER THE FINAL SUMMARY JUDGMENT?

FACTS SUPPORTING REASONS TO GRANT THE WRIT

The first fact supporting the reason to grant the writ is the fact that the appeal involves a fundamental U.S. constitutional wuestion that has arisen in a state Court. Supporting that fact is the command arising from Art. Vi, ¶ 2 of the U.S. Constitution. Therein the Judges of the Courts of the states are notified that the U.S. Constitution is the Supreme Law of the land. In 1904, in Scott v. McNeal, supra, the U.S. Supreme Court gave the states notice that judgments of state Courts rendered without jurisdiction that affected property violated due process of law, since the 14th Amendment was a limitation upon the judicial power of states. The case informed the states that their judicial departments were as much bound by the mendment as were the legislative and executive departments.

The second arises from the State-Federal relationship. The U.S. Supreme Court has established a policy that it much prefers that the highest Court of a state have the first opportunity to rule upon a U.S. Constitutional question, where it is asserted by a person in a state Court that state action has invaded the U.S. Constitution. Such opportunity is in this case hereby offered to Oklahoma's highest Court. There is not any other fact needed.

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT.

Part 1.

The D'Oench-Duhme Doctrine of the U.S. Supreme Court and Title 12 U.S.C.A. § 1823(e) are federal laws that have no application to this case.

1978, *Riverside Park Realty Co. v. F.D.I.C.*, 465 F.Supp. 305, D.C., M.D.Tenn., (6th Cir.), Chief Dist. Judge Morton.

1981, *Howell v. Continental Credit Corp.*, 655 F.2d 743, 7th Cir., Judge Pell.

1984, *F.D.I.C. v. Merchants Nat. Bank of Mobile*, 725 F.2d 634, 11th Cir., Judge Godbold.

1984, *F.D.I.C. v. Panelfab Puerto Rico, Inc.*, 739 F.2d 26, 1st Cir., Judge Pettine.

1986, *F.D.I.C. v. Rivera-Arrovo*, 645 F.Supp. 511, D.C. Puerto Rico. (1st Cir.), Judge Cerezo.

Quotations are in Appendix No. 1, *infra.*

In these 5 cases, the central theme of non-applicability of the above federal laws is that in no possible way could F.D.I.C. suffer harm to the deposit insurance fund. In one case, *as in this case,* F.D.I.C. was found guilty of attempting to *add money* to its asset. Judge Fullerton

held and decided that federal law precluded and estopped appellants from requesting him to decide the *onus probani* of appellee of appellants' liability, Oklahoma law. In his order refusing to reconsider, he candidly and courageously wrote, in substance, I cannot decide that question. This federal law bars appellants' request to me. In his order, he said that he had been requested by the appellants to do this. non-Applicability of this federal law *destroyed for more than one reason. Applicability vel non* involved a statutory limited special jurisdiction *case class* of subject-matter jurisdiction. *Jurisdictional facts* of applicability were not present. The question was *not* whether something had diminished the value of the asset. The question was what was the *original* value of the asset on May 3, 1983. Another question was whether a rule of trial precedure of Oklahoma applied. *Oklahoma* procedural law *was the actor.* There are no *human actors* in this case. That Oklahoma procedural law was the actor is the reason that this bench cae is a stronger case than any of the 5 cited cases. *Next,* there was *no pleading* filed that telephoned Judge Fullerton that a special limited statutory jurisdiction *claim* for relief had been filed. His Honor 'sleeps' until his phone rings. He had the jurisdiction *case class,* but his telephone had to ring, invoking it. Briefs will not ring the telephone!!! *Next,* no *justiciable* issue can arise for adjudication from a non-applicable statutory source of jurisdiction. *Next,* clainamts who attempt to invoke a non-applicable statute have no standing to sue. justiciability and standing to sue, separately, *are* jurisdictional requirements. Authorities make up Appendix No. 2, *infra.*

> Jurisdictional facts must appear in this certified transcript of the record proper to support Judge Fullerton's application of federal statutory law. They do not appear in the record of this case.

The previously cited 5 federal court cases provide *examples of cae facts that fail to constitute the jurisdictional facts.* The jurisdictional facts are specified by federal law. *The result of failed federal law jurisdictional facts is governed by Oklahoma law.* When federal law jurisdictional fact *exist,* the federal law in question then becomes Oklahoma law and applicable. 12 U.S.C.A. § 1819 (4th). When federal law jurisdictional facts *do not exist, federal law does not control the results*—Oklahoma law does. *The lack of federal law jurisdictional facts in tthis case is settled by the cited 5 federal court cases.* By the law of Oklahoma, cited and quoted in Appendix No. 2, *infra,* the decision or order of Judge Fullerton that federal law precluded and estopped appellants from requesting him to apply the Oklahoma law of *omus probandi* to appellee's allegations of appellants' liability was an *ultra vires* act, *corum non judice* and void. *Its fruit,* the final summary judgment against appelants was also null and void. 'It is bad everywhere and good nowhere', a rule so often stated, that it needs no citation.

The summary judgment, until declared null and void, operates and affects the property of appellants. Because a lack of subject matter jurisdiction produced the summary judgment, it was state action that deprived appellants of 14th Amendment 'due process of law'. *Scott v. McNeal,* supra. The case record is persuasive, pervasive fundamental constitutional error and reviewable by this Court, the

opinion of the Court of Appeals to the contrary notwithstanding.

Respectfully submitted

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ITEM # 12

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed
Wednesday, September 23, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

74,513 **Federal Deposit Insurance Corp. etc. v. Mike Barnett et al.**
Certiorari denied.
CONCUR: Hodges, V.C.J., Simms, Wilson, Summers, Watt, JJ.
DISSENT: Opala, C.J., Lavender, Hargrove, Kauger, JJ.

75,311 **In the Matter of the Estate of Alta Booth, ormerly Alta White, deceased; Theda M.ier v. Everett Lake et al.**
Certiorari denied.
CONCUR: All Jutices concur.

75,279 **Harold Massey and Dorothy Massey v. Farmers Insurance Group etc.**
Rehearing denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Summers, Watt, JJ.
DISSENT: Opala, C.J.
NOT PARTICIPATING: Kauger, J.

76,070 **Putnam Plaza Company etc. v. American Guaranty Title Company.**
Certiorari denied.
CONCUR: All Justices concur.

76,399 **The F & M Bank & Trust Company etc. v. Jack B. Sellers etc.**
Certiorari denied.
CONCUR: Lavender, Simms, WIlson, Watt, JJ., Johnson, S.J.
DISSENT: Hodges, V.C.J., Hargrave, Kauger, Summers, JJ.

Charles A. Johnson, S.J., sitting by designation in lieu of Opala, C.J., who certified his disqualification.

76,806 **Construction Services Division et al. v. MGI, Inc. etc. et al.**
Certioriri denied.
CONCUR: Opala, C.J., Lavender, Simms, Wilson, Kauger, Summers, Watt, JJ.
DISSENT: Hargrave, J.

77,161 **Hope Lodes v. State of Oklahoma ex rel Oklahoma Real Estate Commission.**
Certiorari denied.
CONCUR: All Justices concur.

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

No. 92-1127

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN R. HELTON, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR VICTOR SAVINGS AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (1988 & Supp. III 1991) bar petitioners' defenses to liability under notes and guaranties held by the FDIC.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1127

JOHN R. HELTON, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR VICTOR SAVINGS AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the Oklahoma Supreme Court denying a petition for discretionary review (Pet. App. A167) is unreported. The opinion of the Oklahoma Court of Appeals (Pet. App. A146-A150) is unreported. The opinions of the trial court (Pet. App. A90-A94, A95-A103) are unreported.

JURISDICTION

The judgment of the Oklahoma Court of Appeals was entered on December 3, 1991. The judgment of the Oklahoma Supreme Court denying discretionary review was entered on September 23, 1992. The petition for a writ of certiorari was filed on December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. On May 13, 1983, Sooner Vista Partnership (the Partnership) executed a promissory note payable to Victor Federal Savings and Loan Association (Victor Federal) in the amount of $217,843.21. On the same day, the Partnership executed a mortgage securing its obligation to repay the note. Petitioners, partners in the Partnership, also executed written guaranty agreements on the same day, in which each of them guaranteed payment of a portion of the indebtedness evidenced by the note. Pet. App. A97.

On March 13, 1987, the Federal Home Loan Bank Board (FHLBB) appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Victor Federal. On the same day, the assets of Victor Federal were transferred to a newly chartered institution, Victor Savings and Loan Association (Victor Savings). In July 1988, the FHLBB also appointed FSLIC receiver for Victor Savings. When the Partnership subsequently defaulted on the note, FSLIC, as receiver for Victor Savings, filed suit to enforce the note and the guaranties in the District Court of Delaware County, Oklahoma. Pet. App. A97-A99.

2. Petitioners raised a number of defenses, including assertions that a renewal note executed by the Partnership amounted to a novation that released them from liability under the note and their respective guaranties. The district court rejected those arguments and granted summary judgment for the FDIC.[1] Pet. App. A95-A103.

---

[1] FSLIC was abolished on August 9, 1989, pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 401, 103 Stat. 354. The Federal Deposit Insurance Corporation (FDIC) has succeeded to all FSLIC's rights and duties as receiver for Victor Savings. 12 U.S.C. 1821a(a)(5)(A)(ii) (Supp. III 1991) (providing that

The court explained that petitioners were "estopped pursuant to *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447 (1942), and its progeny" from raising certain defenses, and that other defenses failed "as a matter of law." Pet. App. A99.[2]

3. Petitioners then filed a motion for reconsideration, contending, among other things, that they were not subject to joint and several liability, because each of them was liable only for a pro rata share of the obligation. The district court denied the motion in November of 1989. Pet. App. A90-A94. The court reiterated its view that petitioners' defenses were barred by the application of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and the related provisions of 12 U.S.C. 1823(e) (1988 & Supp. III 1991). Pet. App. A92.

4. The Oklahoma Court of Appeals affirmed. Pet. App. A146-A150. After reviewing the record, the court concluded that none of petitioners' claims had been properly preserved:

> The state of the record in this case makes it unnecessary to address the issues briefed by [petitioners], because none of the issues raised and briefed on appeal were properly preserved or presented for review and disposition. The single issue of novation raised in the response to the motion for summary judgment was not raised on appeal, while the question of pro rata liability presented on

---

"[e]ffective August 10, 1989, the Corporation shall succeed [FSLIC] as * * * receiver with respect to any depository institution * * * for which a * * * receiver was appointed before January 1, 1989"); see also 12 U.S.C. 1811 (Supp. III 1991) (references to the "Corporation" describe the Federal Deposit Insurance Corporation).

[2] The decision is reflected in a journal entry entered on January 17, 1990, Pet. App. A103, but was made at a hearing in September 1989, see *id.* at A96.

> appeal was not raised in the motion for summary judgment before the trial court.

Id. at A149.

5. The court of appeals denied a petition for rehearing without opinion. Pet. App. A157. The Supreme Court of the State of Oklahoma denied a petition for a writ of certiorari without opinion. *Id.* at A167.

ARGUMENT

This Court's jurisdiction under 28 U.S.C. 1257(a) does not extend to cases in which an adequate and independent state ground supports the judgment of the state court:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Herb v. *Pitcairn*, 324 U.S. 117, 125-126 (1945); see generally Charles Alan Wright, *The Law of Federal Courts* § 107, at 745-748 (4th ed. 1983). When an adequate and independent state ground exists, the Court has no jurisdiction over a petition challenging the decision of the state court. See *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935) ("our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment"); Robert L. Stern et al., *Supreme Court Practice* § 3.25, at 168-169 (6th ed. 1986).

The decision of the Oklahoma Court of Appeals in this case rests on an adequate and independent state ground: petitioners' failure to comply with conventional rules for

preserving a claim for presentation on appeal. Because the state court determined that the only claims petitioners properly presented on appeal were not claims petitioners properly had raised in opposition to respondent's motion for summary judgment, the court acted reasonably in declining to address petitioners' claims, and no issue of federal law affected that action. Because the decision of the state court did not determine any federal question, this Court has no jurisdiction to review that decision.

In any event, the petition does not present any substantial question that would merit this Court's attention. The principal contention (Pet. 10-11) seems to be that the lower courts misapplied the *D'Oench, Duhme* doctrine in determining that petitioners could not avoid liability under written documents by means of defenses not set forth in those documents or in other documents contained in the official records of the failed institution. That ruling is an unexceptionable application of the language of 12 U.S.C. 1823(e) (1988 & Supp. III 1991) and this Court's decision in *D'Oench, Duhme*; none of the cases cited by petitioners suggest anything to the contrary. To the extent petitioners suggest (Pet. 12) that the state trial court had no jurisdiction, they are incorrect. The Oklahoma trial court was a court of general rather than limited jurisdiction. See Okla. Const. art. VII, § 7(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

92-1127(6)

NO.

Supreme Court, U.S.
FILED
MAR 24 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM

JOHN R. HELTON, ET AL.,
PETITIONERS,

V.

F.D.I.C., RECEIVER FOR VICTOR SAVINGS AND LOAN ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

REPLY TO BRIEF IN OPPOSITION

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qpp

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There was no 'adequate and independent state law grounds' for the Oklahoma court of appeals to affirm the trial court's summary judgment. Reply to brief of respondent 4,5

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U.S. Const., Arts. VI Parg. 2 3
U.S. Const., Art. X 3

D'Oench and 12 U.S.C. § 1823(e) 4,5

REPLY POINT ONE

There was no 'adequate and independent state law grounds' for the Oklahoma court of appeals to affirm the trial court's summary judgment. Reply to brief of respondent, pages 4 and 5.

It was not and *could not* be 'adequate and independent' because the appeal court NEVER DECIDED AND REFUSED TO DECIDE the sole and only appellate issue sumitted to it by the petitioners. It had NO APPELLATE JURISDICTION of the issues that it *purported* to decide.

The court of appeals *and* the respondent's brief *ignore* the mandatory duty of the Oklahoma court of appeals when

> "* * * the question of jurisdiction is an issue which is "primary and must be inquired into and answered by this court, both as to its own jurisdiction as well as to the jurisdiction of the court from which the appeal is taken, whether raised by any party or not." *Davis v. Sandlin, Okl.* 392 P.2d 722, 723 (1964; *Cavnar v. Cohlma, Okl.*, (1973), 44 OBJ 894 (March 6, 1973) as Modified, 44 OBJ 1719 (May 19, 1973)."
>
> "The general rule set forth in 5 Am. Jur.2d, Appeal & Error, § 987, is:
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> "In civil cases it is a well recognized rule that questions not advanced on the original hearing will not be considered on petition for rehearing, except in unusual circumstances, *or where fundamental or jurisdictional error* is involved." (E.A.)" [Emphasis in orig.]

Pointer v. Hill, Okl. 1975 536 P.2d 358, 361. And,

> "4. Where a judgment is void for lack of jurisdiction of the trial court over the res, this court will reverse in order to permit the trial court to dismiss the action on jurisdictional grounds." [Syllabus by the Court.]

Harber v. McKeown, (1945) 195 Okl. 290, 157 P.2d 753.

Conclusion: The opinion and affirmance order of the court of appeals, is, itself, *corum non judice* and void. The court of apeals, *failed and refused* to perform its manditory duty. Manifestly, then, the action of that court cannot be an "adequate and independent state law grounds" decision. The brief of respondent has applied a rule of law where the bench case facts will not support the application. See, question two, front page, petition for certiorari.

The court of appeals *butchered* the record before it. It is stated in the last three paragraphs of its opinion. Appendix "B", Item 8, pages A-148 to A-150. These three pages state issues NOT presented for review. The court of appeals 'glossed' the issues PRESENTED for appeal with this sentence: "The amended petition in error added several contentions that the summary judgment violated the contesting partners constitutional rights * * *." Appendix "B", Item 8, page A-149. The First Amended Petition In Error starts on page A-105, Item 1, Appendix "B". The Petition In Error is a 'form'. Its sub-part "D" is found on page A-107. Its title is: "Issues and Errors proposed to be raised on appeal". These described issues and errors are found in Exhibit "C". Exhibit "C" is found on page A-115. Four *errors* are specified. The *issues* are stated on pages A-115 to A-188, inclusive. These issues fixed and determined the jurisdictional scope of review of the court of appeals. The issues assailed the summary judgment against the petitioners as a judgment that was *corum non judice* and a violation by the trial court of petitioners' 14th Amend-

ment, U.S. Constitution, due process rights. It was an extreme detailed complaint stating how *federal* due process had been denied by the trial court's action. It presented a lack of trial court sub-matter jurisdiction that occurred during the course and conduct of the summary judgment trial. It presented an issue that was the manditory duty of the court of appeals to review, regardless of whether or not it had been previously presented to the trial court!!! *It was an issue that was separate and independent of the issues of percentage liability, release and novation.* These last three issues were NOT presented for review. How they were or were not disposed of by the trial court were immaterial. The cases of *Pointer v. Hill* and *Harber v. McKeown, supra,* gauged the jurisdictional reviewing *DUTY* of the court of appeals, under Oklahoma law, *super-added thereto by* the command of Arts. VI, Parg. 2, and X, U.S. Constitution, and Amendment XIV's due process, and the command of *Scott v. McNeal,* 1904, 154 U.S. 34.

In addition to *Lawrence v. State Tax Commission,* 1932, 285 U.S. 276, 282, cited and quoted in the petition for certiorari, page 8, the standard used by this court in *McCoy v. Shaw,* 1928, 277 U.S. 302, 303, is applicable:

> "It is settled law that a judgment of a state court which is put upon a nonfederal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this court, *unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question.* [Four cases cited are omitted]" (Emphasis added.)

The *refusal* of the Oklahoma court of appeals to perform its

mandated jurisdictional reviewing duty should *qualify* as "essentially arbitrary or a mere device to prevent the review of a decision upon the federal question."

REPLY POINT TWO

The petition presents a U.S. Constitutional question that merits this Court's attention. Reply to respondent's brief, page 5.

If the appellate issues in the Oklahoma court of appeals were 'percentage liability', 'release' and 'novation', respondent's brief would be correct. But they were not appellate issues in the court of appeals. They are not appellate issues in this court. The five lower federal court cases, (Petition, page 11), have no applicability to issues of 'percentage liability', 'release' and 'novation'. As to trial court subject matter jurisdiction, these five lower federal court cases make the lack of the trial court's subject matter jurisdiction CONCLUSIVE. They make it conclusive that *D'Oench* and 12 U.S.C. § 1823(e) have no application to *this* case.

Respondent's reference to the general jurisdiction of the trial court as being conferred by the Oklahoma constitution is unquestioned and undenied. But that matter is unconnected to the federal right and federal remedy that is created by *D'Oench* and 12 U.S.A. § 1823(e).

FSLIC sued petitioners to enforce their so-called guaranty agreements as arising under Oklahoma statutory guaranty agreement law, a jurisdiction case-class conferred on the trial court by Oklahoma's constitution. In the due order of proceedings by a brief, in support of a motion for summary judgment, *FSLIC asserted a new and different right and remedy, federal in origin.* This was a subject

matter jurisdiction from a different sovereign. In an Oklahoma district court, FSLIC would be able to enforce Oklahoma made guaranties under Oklahoma law. At the same time in the same Oklahoma case, FSLIC would invoke this set of federal law rights and remedies to escape FSLIC's burden, under Oklahoma law, to prove that its exhibited Oklahoma guaranty agreements proved petitioners' liability to be what FSLIC had alleged that petitioners owed FSLIC. *Turner v. Cox,* 1929, 138 Okl. 225,27, 280 Pac. 568, *Williams v. Phillips Pet. Co. et al.,* 1969, Okl. Sup. Ct., 406 P. 2d. 474,477. Thereby, petitioners would be denied a day in court on the issue of their intended liability to FSLIC. The five federal court cases, cited on page 11 of the petition, hold that the above described 'court capers' could not be done. In the trial court's order refusing to reconsider, Appendix "A", Item 8, page A-90 et seq., the Honorable trial judge has written a resume of how *it happened.* How *it happened is condemned* by these five lower federal court cases. In respondent's brief, page 5, how it happened is said to be a 'misapplic[cation]' of *D'Oench* and 12 U.S.C. § 1823(e). What is *NOT* said is that it was a 'misapplication' of judicial power—i.e., subject matter jurisdiction. 'Misapplication' is a result of the exercise of 'discretion'. The trial judge had *no discretion* in selecting the subjects to be brought before him. *Worcester v. Georgia,* 1832, 6 Pet. 515, 541. This 'misapplication' produced a summary judgment against petitioners that was *corum non judice* and void. The void summary judgment against petitioners took their property without 14th Amendment, due process. *Scott v. McNeal, supra.*

RELIEF REQUESTED

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ R. M. Helton

Petitioners' counsel of record.